The Commonwealth of Massachusetts

DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

ISSUED December 15, 2004

D.T.E. 03-60

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers.

D.T.E. 04-73

Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E. No. 17, filed with the Department on June 23, 2004 to become effective on July 23, 2004 by Verizon New England, Inc. d/b/a Verizon Massachusetts.

CONSOLIDATED ORDER DISMISSING TRIENNIAL REVIEW ORDER INVESTIGATION AND VACATING SUSPENSION OF TARIFF M.D.T.E. NO. 17

APPEARANCES: Bruce P. Beausejour, Esq.
Victor Del Vecchio, Esq.
Barbara Anne Sousa, Esq.
Verizon Massachusetts
185 Franklin Street, 13th Floor
Boston, Massachusetts 02110
FOR: VERIZON NEW ENGLAND, INC. D/B/A
VERIZON MASSACHUSETTS
Intervenor/Petitioner

Jeffrey F. Jones, Esq.
Kenneth W. Salinger, Esq.
Ruth T. Dowling, Esq.
John T. Bennett, Esq.
Michael S. Rabieh, Esq.
Julia E. Green, Esq.
Palmer & Dodge, LLP
111 Huntingdon Avenue
Boston, Massachusetts 02199-7613

-and-

Jay E. Gruber, Esq.
AT&T Communications of New England, Inc.
99 Bedford Street, 4th floor
Boston, Massachusetts 02111

-and-

Harry M. Davidow, Esq.
685 West End Avenue, #4-C
New York, New York 10025
FOR: AT&T COMMUNICATIONS OF NEW ENGLAND
ACC NATIONAL TELECOM CORP.
TELEPORT COMMUNICATIONS BOSTON
Intervenors/Respondents

Robert J. Munnelly, Jr., Esq.
Murtha Cullina LLP
99 High Street – 20th Floor
Boston, Massachusetts 02110
FOR: DSCI CORPORATION
Intervenor

Steven A. Augustino, Esq.
Andrew M. Klein, Esq.
Erin M. Emmott, Esq.
Kelley Drye & Warren
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
FOR: BRIDGECOM INTERNATIONAL, INC.;
BROADVIEW NETWORKS, INC.;
CHOICE ONE COMMUNICATIONS OF MASSACHUSETTS, INC.;
FOCAL COMMUNICATIONS CORPORATION OF MASSACHUSETTS;
XO MASSACHUSETTS, INC.
Intervenors

Genevieve Morelli, Esq.
Michael B. Hazzard, Esq.
Brett Heather Freedson, Esq.
Kelley Drye & Warren
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
FOR: BROADVIEW NETWORKS, INC.;
BULLSEYE TELECOM, INC.;
INFOHIGHWAY COMMUNICATIONS CORPORATION;
MCGRAW COMMUNICATIONS, INC.;
METTEL;
TALK AMERICA, INC.
Intervenors

Genevieve Morelli, Esq.
Erin Weber Emmott, Esq.
Kelley Drye & Warren, LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
FOR: ARC NETWORKS, INC. d/b/a INFOHIGHWAY COMMUNICATIONS CORP.
BROADVIEW NETWORKS, INC.
BROADVIEW NP ACQUISITION CORP.
BULLSEYE TELECOM, INC.
SPECTROTEL, INC.
Intervenors/Respondents

Mark A. Stachiw, Esq.
Jeffrey J. Binder, Esq.
Allegiance Telecom, Inc.
9201 Central Expressway
Dallas, Texas 75231
FOR: ALLEGIANCE TELECOM, INC.
Intervenor

Robert A. Ganton, Esq.
U.S. Army Legal Service Agency
901 North Stuart Street, Suite 525
Arlington, Virginia 22203-1837

-and-

Harry Gildea, Esq.
Snavely, King, Majoros, O'Connor & Lee
1220 L Street, N.W., Suite 410
Washington, D.C. 20005
FOR: UNITED STATES DEPARTMENT OF DEFENSE AND ALL OTHER FEDERAL AGENCIES
Intervenor

Jason Spinnard, Esq.
Granite Telecommunications, LLC
234 Copeland Street
Quincy, Massachusetts 02169
FOR: GRANITE TELECOMMUNICATIONS, LLC
Intervenor

Genevieve Morelli, Esq.
Erin Weber Emmott, Esq.
Heather T. Hendrickson, Esq.
Kelley Drye & Warren
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

-and-

Anthony Hansel, Esq.
Covad Communications Company
600 14th Street, N.W., Suite 750
Washington, D.C. 20005
FOR: COVAD COMMUNICATIONS COMPANY
Intervenor

Patrick J. Donovan, Esq.
Philip J. Macres, Esq.
Swidler Berlin Shereff Freidman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
FOR: LIGHTSHIP TELECOM, LLC
Intervenor

Richard M. Rindler, Esq.
Paul B. Hudson, Esq.
Swidler Berlin Shereff Friedman LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
FOR: DSLNET COMMUNICATIONS, LLC
Intervenor

Patrick J. Donovan, Esq.
Philip J. Macres, Esq.
Swidler Berlin Shereff Freidman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
FOR: RCN-BECOCOM, LLC
Intervenor

Craig D. Dingwall, Esq.
Director/General Attorney, State Regulatory
Sprint Corporation
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
FOR: SPRINT CORPORATION
Intervenor

Richard C. Fipphen, Esq.
MCI
200 Park Avenue, 6th Floor
New York, NY 10017
FOR: MCI
Intervenor

Thomas F. Reilly
Attorney General of the Commonwealth of Massachusetts
By: Karlen J. Reed, Esq.
Assistant Attorney General
Utilities Division
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Intervenor

Scott Sawyer, Esq.
Gregory M. Kennan, Esq.
Conversent Communications of Massachusetts, LLC
24 Albion Road, Suite 230
Lincoln, Rhode Island 02865
FOR: CONVERSENT COMMUNICATIONS OF MASSACHUSETTS, LLC
Intervenor

Douglas Denny-Brown, Esq.
General Counsel and V.P. Regulatory Affairs
RNK, Inc. d/b/a RNK Telecom
333 Elm Street
Dedham, Massachusetts 02026
FOR: RNK, INC. D/B/A RNK TELECOM
Intervenor

Eric Krathwolh, Esq.
Rich May
176 Federal Street
Boston, Massachusetts 02110
FOR: UNITED SYSTEMS ACCESS TELECOM, INC.
Intervenor

Tom Koutsky, Esq.
Peggy Rubino, Esq.
Z-Tel Communications, Inc.
601 South Harbour Island Boulevard
Tampa, Florida 33602
FOR: Z-TEL COMMUNICATIONS, INC.
Intervenor

John B. Adams, Esq.
The Adams Law Firm, LLC
Suite C-312
626 Admiral Drive
Annapolis, Maryland 21401
FOR: RICHMOND CONNECTIONS, INC. D/B/A RICHMOND NETWORX
Intervenor

James Norton, Esq.
Paven & Norton
15 Foster Street
Quincy, Massachusetts 02169
FOR: COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 1
Limited Participant

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I. INTRODUCTION

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("Telecommunications Act"), sought to promote competitive market entry in the telecommunications markets by opening the network elements of incumbent local exchange carriers ("ILECs") to competitive local exchange carriers ("CLECs") when the failure to provide unbundled access to such network elements would "impair" the ability of a CLEC seeking access to provide the services that it seeks to offer. 47 U.S.C. § 251(d)(2). The Telecommunications Act gave the Federal Communications Commission ("FCC") the power to determine which network elements must be made available on an unbundled basis. Id. The FCC has determined that when a CLEC is impaired without access to a network element, the ILEC must provide access to it as an unbundled network element ("UNE") priced at its total element long run incremental cost ("TELRIC").[1] The FCC promulgated regulations to implement the unbundling obligations contained in Telecommunications Act in a series of orders subsequently invalidated in part by reviewing courts. See Local Competition Order,[2]

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1 See 47 C.F.R. § 51.505; Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002).

2 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) ("Local Competition Order"), remanded in part by AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999).

UNE Remand Order,[3] Line Sharing Order;[4] Triennial Review Order.[5] Although the D.C. Circuit Court's recent decision to vacate and remand the Triennial Review Order invalidated the FCC's mass market local circuit switching rules, the FCC issued the Interim Rules Order,[6] which ordered all vacated unbundling obligations that were in effect as of June 15, 2004 to remain in effect. The Interim Rules Order maintains the current rules until the earlier of either the March 14, 2005 or when the FCC's final rules take effect. Interim Rules Order at ¶ 29. We observe that while the FCC has voted to adopt final rules, those rules have yet to issue.[7]

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3 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order"), remanded by United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"), cert. denied, 538 U.S. 940 (2003).

4 Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (rel. Dec. 9, 1999) ("Line Sharing Order"), vacated and remanded by USTA I.

5 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order"), vacated in part by United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), cert. denied, Nos. 04-12, 04-15, 04-18 (Oct. 12, 2004).

6 In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) ("Interim Rules Order").

7 See Press Release, FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers (Dec. 15, 2004).

While the FCC's press release provides some guidance as to the new rules, those rules are not yet in effect.

II. PROCEDURAL HISTORY

A. Introduction

The two proceedings discussed in this Order both arise from the Triennial Review Order. We address both proceedings together, because they share common issues and many of the comments filed by the participants apply to both, but these dockets are not consolidated.

B. Triennial Review Order Investigation

On August 26, 2003, the Department opened an investigation in accordance with the FCC's rules for determining whether CLECs were "impaired" in geographically specific markets with respect to local circuit switching provisioned to serve mass markets customers. Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers, D.T.E. 03-60, Vote and Order to Open Investigation (Oct. 26, 2003). The Department also included an investigation of loop, transport, and hot cut issues[8] in that proceeding.

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[8] In addition to the batch hot cuts and "large job" hot cuts processes proposed by Verizon in response to the FCC's requirements in the Triennial Review Order, the Department instructed Verizon to propose a Wholesale Provisioning Tracking System ("WPTS") process for individual hot cuts. See D.T.E. 03-60, Hearing Officer Memorandum at 2 (Nov. 24, 2003); see also UNE Rates Proceeding, D.T.E. 01-20, Letter Order on Conversent Communications' Motion for Reconsideration at 3 n.4 (Aug. 6, 2003).

The Department received comments and intervention petitions from Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"); AT&T Communications of New England, Inc. ("AT&T"); Allegiance Telecom, Inc. ("Allegiance"); United States Department of Defense and all other Federal Executive Agencies ("DOD/FEA"); BridgeCom International, Inc. ("BridgeCom"); Covad Communications Company ("Covad"); Sprint Corporation ("Sprint"); MCI; and Conversent Communications of Massachusetts, Inc. ("Conversent"). The Department received joint comments and requests to intervene from BridgeCom, Broadview Networks, Inc., Choice One Communications of Massachusetts, Inc., Focal Communications Corporation of Massachusetts, and XO Massachusetts, Inc. (collectively, "Loop Transport Carrier Coalition"). The Department also received joint comments and requests to intervene from Bullseye Telecom, Inc., Broadview, InfoHighway Communications Corporation ("InfoHighway"), McGraw Communications, Inc., MetTel, Talk America, Inc., and Z-Tel Communications, Inc. (collectively, "CLEC Coalition"). In addition to the above, the Department received requests to participate from United Systems Access Telecom, Inc. ("USAT"); DSCI Corporation ("DSCI"); Richmond Connections, Inc. d/b/a Richmond Networx ("Richmond Networx"); Granite Telecommunications, LLC ("Granite Telecom"); DSLNet Communications ("DSLNet"); Lightship Telecom, LLC ("Lightship Telecom"); RCN-BecoCom, LLC ("RCN"); RNK, Inc. d/b/a RNK Telecom ("RNK"); and Communications Workers of America, District 1 ("CWA"). Pursuant to G.L. c. 12, § 11E, the Attorney General of the Commonwealth of Massachusetts ("Attorney General") filed a notice of intervention in this proceeding.

On March 2, 2004, before the hearings were to have been conducted in this proceeding, the D.C. Circuit Court vacated the FCC's rules subdelegating to state commissions the FCC's Section 251(d)(2) authority to determine whether CLECs are impaired without access to network elements, and in particular, the FCC's rules for subdelegating its mass market switching determinations. USTA II, 359 F.3d at 568. The Court also vacated the FCC's national finding of impairment for mass market switching because the FCC's conclusion that CLECs were impaired by localized difficulties in obtaining hot cuts did not clearly support a non-provisional national impairment finding. Id. at 569. The Court similarly vacated the FCC's national impairment findings with respect to high-capacity dedicated transport, because the FCC unlawfully delegated to the states its Section 251(d)(2) authority to find non-impairment where competitive "triggers" were met and where the FCC's "numerous and largely unquantified alternative criteria" are satisfied. Id. at 574. The Court withheld its mandate of USTA II until June 15, 2004.

On March 3, 2004, Verizon moved to stay the Department's investigation into mass market switching and hot cuts, with the exception of Verizon's WPTS process, for at least 60 days or until it is clear whether there will be any continuing state role in the relevant impairment determinations (Verizon Motion to Stay at 2). Because of the uncertainty surrounding the FCC's potential response to USTA II, the Department stayed the entire proceeding indefinitely. D.T.E. 03-60, Interlocutory Order on Motion to Stay (Apr. 2, 2004). During the period that the D.C. Circuit Court withheld its mandate, AT&T and the CLEC Coalition filed separate emergency motions to require Verizon to continue to provision UNEs at their current rates and terms. The Department declined to act on the motions, because Verizon pledged to provide CLECs with at least 90 days notice before taking any action to change its provisioning of UNEs. D.T.E. 03-60, Letter Order at 2 (June 15, 2004). The Department also requested the parties to brief a series of questions to assist the Department in determining whether it could take action on any of the issues raised in D.T.E. 03-60 and the emergency motions, where the FCC's unbundling rules have been vacated. Id.

The Department received briefs from: AT&T, the Attorney General, Conversent, Covad, Joint CLECs (consisting of ACN Communications Services, Inc.; Allegiance; Choice One; CTC Communications Corp.; DSLnet; Focal Communications Corporation; Lightship Telecom; McGraw Communications; RCN-BecoCom; RCN Telecom Services of Massachusetts, Inc.; segTEL, Inc.; and XO Massachusetts, Inc.), Joint Parties (consisting of InfoHighway; Broadview Networks, Inc.; Broadview NP Acquisition Corp.; Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp.; DSCI; Metropolitan Telecommunications, Inc.; XO Communications, Inc.; and XO Massachusetts, Inc.), MCI, Sprint, and Verizon. The Department received reply briefs from AT&T, Conversent, Joint CLECs, Joint Parties, Sprint, and Verizon.

C. Verizon's Tariff Revisions

On June 23, 2004, Verizon filed with the Department proposed revisions to Tariff M.D.T.E. No. 17, to become effective on July 23, 2004. Verizon asserted that the proposed revisions were in accordance with the FCC's new rules promulgated in the Triennial Review Order pertaining to the availability of certain unbundled network elements, including elements related to local circuit switching when provisioned to serve "enterprise" customers that are served using a DS1 or above loop or with four or more lines at the DS0 level ("four line carve out"). Specifically, these rules provide that an incumbent local exchange carrier is not required to provide access to enterprise switching as a UNE. 47 C.F.R. § 51.319(d)(3). These rules were not vacated by USTA II. The Department did not petition for a waiver of the FCC's finding of non-impairment, because no carrier alleged facts that would be sufficient in order for the Department to state a claim of local impairment for enterprise switching before the FCC under the rules established for petitioning for a waiver. Enterprise Switching, D.T.E. 03-59 (2003).

The Department sought comments on the proposed tariff revisions. On July 9, 2004, AT&T Communications of New England, Inc., ACC National Telecom Corp., and Teleport Communications Boston (collectively, "AT&T") filed joint comments, and InfoHighway, Broadview Networks, Inc., Broadview NP Acquisition Corp., BullsEye Telecom Inc., and Spectrotel, Inc. (collectively, "Joint CLECs-II") also filed comments. Verizon filed reply comments on July 14, 2004.

On July 22, 2004, the Department docketed this matter as D.T.E. 04-73 and suspended the tariff revisions. We suspended the tariff, because we anticipated that participants in D.T.E. 03-60 would file responses to briefing questions, one of which asked whether Section 271 of the Telecommunications Act of 1996 obligates Verizon to continue to provide "de-listed" UNEs. Further, we also anticipated that, in response to USTA II, the FCC would soon issue an interim rules order that had been widely characterized as a "standstill" order (see, e.g., Joint CLECs-II Comments at 2 n.5). It is clear now, however, that the Interim Rules Order as issued applies only to mass market local circuit switching, not to enterprise switching. Interim Rules Order at 1 n.3. Therefore, in determining whether to permit Verizon's tariff revisions to take effect by vacating our suspension order, we will consider the issues raised by the comments filed in D.T.E. 04-73 and by the responses to the briefing questions in D.T.E. 03-60.

III. DISMISSAL OF TRIENNIAL REVIEW INVESTIGATION

A. Introduction

With the exception of our investigation into Verizon's WPTS hot cuts process, we predicated our decision to open the investigation in D.T.E. 03-60 upon the FCC's subdelegation of its authority to the Department to make findings of impairment pursuant to 47 U.S.C. § 251(d)(2). That is, we were to determine, based on the FCC's unbundling rules, whether on a granular basis in specific geographic or product markets, the lack of access to Verizon's mass market circuit switching, UNE-P, high capacity loops, or dedicated transport elements poses an operational or economic "barrier to entry" that is likely to make entry into the market "uneconomic."[9] See 47 C.F.R. § 51.319(d); Triennial Review Order at ¶ 84. The D.C. Circuit Court vacated and remanded these unbundling rules, including the FCC's

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9 We note that although the D.C. Circuit Court did not reach the issue of whether the FCC's definition of "impairment" was lawful, the court observed that if that question were reached, the FCC's definition of impairment was "vague almost to the point of being empty," because the FCC did not clarify for whom market entry should be considered uneconomic. USTA II, 359 F.3d at 572.

subdelegation of authority to the Department.[10] We now review the parties' arguments for proceeding with this investigation on alternate grounds.

B. Relevant Statutes

In reviewing the Department's options, we first outline the statutory framework governing the Department's jurisdiction over these matters under federal and state law. Under federal law, the Telecommunications Act provides that certain network elements must be unbundled:

> In determining what network elements should be made available for purposes of [47 U.S.C. § 251(c)(3)], the [FCC] shall consider, at a minimum, whether–
>
> (A) access to such network elements as are proprietary is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2). The Telecommunications Act further provides:

> In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that–
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3).

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10 There is some dispute whether USTA II vacated the FCC's unbundling rules for high capacity loops, as we discuss below.

Under Massachusetts law, the Department has the power of “general supervision and regulation of, and jurisdiction and control” over the “transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication . . . .” G.L. c. 159, § 12. This jurisdiction extends to services “when furnished or rendered for public use within the commonwealth” by “common carriers.” Id. The Department exercises jurisdiction over such intrastate telecommunications services, i.e., furnished within the commonwealth, to the full extent not preempted by federal law. See Verizon New England, Inc., D.T.E. 98-57-Phase-III-D at 13 (2004). Further, Massachusetts law provides that

> [w]henever the department shall be of opinion . . . that any of the rates, fares, or charges of any common carrier for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory, unduly preferential, in any wise in violation of any provision of law, or insufficient to yield reasonable compensation for the service rendered, the department shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed.

G.L. c. 159, § 14; see also G.L. c. 159, § 16.

C. Briefing Questions

The question before the Department is whether and to what extent the Department may act under the statutory framework outlined above, taking into consideration the FCC’s actions and the D.C. Circuit Court's rulings in USTA II.[11] We asked the parties to respond to briefing questions to give the parties the opportunity to answer specific questions with respect to the Department's jurisdiction over UNEs and the effect of USTA II.

Below, we review the responses to each of the questions[12] with the exception of the following: (1) whether carriers have an obligation to file interconnection agreements on "de-listed" UNEs with the Department; (2) whether USTA II effected a "change of law" under those interconnection agreements; and (3) what steps the Department should take to encourage carriers to enter into voluntary commercial agreements. These three questions are more appropriately addressed in the Department's ongoing consolidated arbitrations proceeding, D.T.E. 04-33, in which the carriers' obligations will be determined according to their specific interconnection agreements. We also omit discussion of whether the Department should impose a transition plan for de-listed UNEs, as has been considered by the New York Public Service Commission,[13] because the Interim Rules Order has rendered the question moot for now; moreover, it appears that the FCC will impose a transition period in the final rules.

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11 The Department has jurisdiction to determine whether its broad delegation of authority from the state legislature is limited by the D.C. Circuit Court's ruling vacating the FCC's subdelegation of its authority to the Department and whether the Department may still exercise authority to unbundle network elements under state law consistent with federal law. G.L. c. 159, § 12; 47 U.S.C. § 251(d)(3); see MCI WorldCom Communications, Inc. v. Department of Telecommunications and Energy, 442 Mass. 103 (2004).

12 In the following Sections, the Department's briefing questions are noted in italics, followed by the parties' responses and the Department's discussion of each question.

13 In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271, N.Y.P.S.C. Case No. 04-C-0420.

1. Unbundling Obligations Under Federal Law Post-USTA II

When the vacatur takes effect, what are Verizon's obligations with respect to mass market switching, UNE-P, high capacity loops, and dedicated transport under applicable federal law, giving effect to any change of law provisions in carriers' interconnection agreements? What is the appropriate role for the Department, if any, under federal law when the vacatur takes effect?

a. Positions of the Parties

While the parties disagree as to the effect of USTA II upon Verizon's Section 251(c) obligations, they are in agreement that the parties' rights with respect to these unbundling obligations should be determined according to the terms of their interconnection agreements and that the Department has the authority to interpret and enforce the interconnection agreements (AT&T Brief at 1-6; Conversent Brief at 10-11; Joint CLEC Reply Brief at 1-2; Joint Parties Brief at 8-10; Verizon Brief at 7-10; MCI Brief at 2; see also Attorney General Brief at 3 (arguing that the Department should determine UNE obligations pursuant to the Interim Rules Order and protect customers from service interruptions during their providers' transition from UNE-P to UNE-L)).[14]

The CLECs argue, however, that nothing in USTA II constitutes a finding that Verizon has no obligation under either federal or Massachusetts law to provide unbundled mass market switching and dedicated transport at TELRIC (AT&T Brief at 6; AT&T Reply Brief at 6-7; Conversent Brief at 8; Joint CLECs Brief at 2; see also Sprint Brief at 3). Moreover, the

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14 We note that some of the parties argue for different reasons that USTA II did not trigger a "change of law" event, or that even if it did, it would be wasteful to go through process until the FCC issues its final rules (see, e.g. AT&T Brief at 46-48; MCI Brief at 2-3; Verizon Brief at 32). As we stated above, these arguments will be considered in D.T.E. 04-33.

CLECs argue that the D.C. Circuit did not rule that the FCC is precluded from finding that the currently provided UNEs must continue to be provided, but rather, the court only criticized the FCC's method of evaluating evidence (AT&T Brief at 4, 7; Conversent Brief at 15-17; Sprint Brief at 3). The CLECs maintain that on remand the FCC could make the same unbundling decisions that it made in the Triennial Review Order (AT&T Brief at 4; Conversent Brief at 15; see also Joint CLECs Brief at 2). Further, they argue that USTA II did not vacate the FCC's unbundling rules for high capacity loops; rather, they argue that the court could not have reached its ruling to uphold the FCC's decision to deny access to hybrid loops had it also eliminated access to unbundled high capacity loops, because the court recognized that the FCC's determination relied upon the availability of loop alternatives (AT&T Reply Brief at 16-17; Conversent Brief at 3-4; Joint Parties Brief at 3; MCI Brief at 3).

Verizon argues that the vacatur eliminated the ILECs' unbundling obligations under Section 251 for mass-market switching, high capacity loops and dedicated transport (Verizon Brief at 7, 10). Verizon maintains that the court explicitly said that in vacating the FCC's subdelegation scheme with respect to dedicated transport elements, it included all high capacity transmission facilities (Verizon Reply Brief at 8).[15] Verizon notes, however, that it will continue to have an obligation under Section 271 to provide local switching, local loop transmission, and local transport from the trunk side of its switches unbundled from other

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[15] Verizon notes that the form of the Department's briefing question is based on the recognition that USTA II vacated Verizon's obligations to provide access to mass market circuit switching, mass market UNE-P, high capacity loops and transport and dark fiber (Verizon Reply Brief at 5).

services, but according to the "just and reasonable" pricing standard set forth in Sections 201 and 202 of the Act, not at TELRIC (id. at 10 n.12, citing 47 U.S.C. § 271(d)(6); D.T.E. 03-59, at 19).

b. Analysis and Findings

The parties are in agreement that USTA II vacated the FCC's unbundling rules with respect to mass market circuit switching and UNE-P, but disagree as to whether the vacatur applies to high capacity loops. The D.C. Circuit Court stated, "We therefore vacate the national impairment findings with respect to DS1, DS3, and dark fiber and remand to the Commission to implement a lawful scheme." USTA II, 359 F.3d at 574, 594. The CLECs' argument that the Court could not have reached its ruling to uphold the FCC's decision to deny access to hybrid loops had the Court also eliminated access to unbundled high capacity loops ignores the Court's agreement with the FCC's consideration of "a range of factors," not just the availability of high capacity loops, in determining not to unbundle hybrid loops. Id. at 582. The Court noted that the FCC found that loop alternatives will mitigate, not eliminate CLEC impairment without access to hybrid loops, but that mass market consumers will still have the benefits of intermodal competition from cable providers. Id. While there may be some ambiguity in USTA II on this point, when the FCC issued its interim rules, it assumed that the D.C. Circuit Court also vacated the Commission's enterprise market loop unbundling rules, in order to ensure a smooth transition from the previous unbundling rules. Interim Rules Order at ¶ 1 n.4. Therefore, we apply the same assumption here.

The parties also disagree, even if the FCC's rules under the Triennial Review Order have been vacated, whether Verizon is obligated under federal law to provide access to those UNEs at TELRIC. Aside from any rights that parties may have under the terms of their interconnection agreements, and aside from the stay imposed by the Interim Rules Order on any changes to provisioning certain elements, we find no other specific bases under the FCC's rules that require Verizon to provide access to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport at TELRIC.

We also determine that, for now at least, the FCC's Interim Rules Order clearly requires Verizon to continue to provide unbundled access to the UNEs that were de-listed by USTA II on the same rates, terms, and conditions applicable as of June 15, 2004, unless otherwise negotiated by the carriers, Interim Rules Order at ¶ 1, thus temporarily providing federal unbundling rules for mass market switching, UNE-P, high capacity loops, and dedicated transport.[16] However, the parties to this proceeding have suggested numerous alternative bases of Department jurisdiction over UNEs in their responses to our briefing questions (as well as in our D.T.E. 04-73 and D.T.E. 04-33 proceedings), and we will address these bases in the following sections.

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16 We note that the D.C. Circuit Court has indicated that it would not act on ILEC mandamus petitions to enforce USTA II until January 4, 2005. United States Telecom Ass'n v. FCC, No. 00-1012 (D.C. Cir. Oct. 6, 2004) (order holding petition for writ of mandamus in abeyance). Thus, if the FCC fails to issue final unbundling rules by the end of this year, and if the D.C. Circuit Court vacates the Interim Rules Order, the question of what actions the Department may take in the absence of valid FCC regulation will resurface.

As we discuss below, we conclude that while the Department continues to have general jurisdiction under state law over the provisioning of Verizon's network elements absent valid FCC unbundling rules, the specific bases of jurisdiction argued by the parties in response to the briefing questions do not provide grounds for requiring those elements to be unbundled; and further, the Department cannot require such elements to be unbundled without first conducting a full, independent investigation into the provisioning of those elements, which is outside the scope of this docket.

2. Unbundling Obligations Under State Law

In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport, what are Verizon's obligations to provide such UNEs under Massachusetts law?

a. Positions of the Parties

The CLECs claim that the Telecommunications Act not only empowers state commissions to approve and enforce terms of interconnection agreements, but it also authorizes state commissions to add unbundling and other obligations under those commissions' state law authority (AT&T Brief at 9; Joint Parties Brief at 18-19). The CLECs note that the FCC itself argued in its motion to stay the D.C. Circuit court's vacatur that "[i]n the absence of binding federal rules, state commissions will be required to determine not only the effect of [the D.C. Circuit's] ruling on the terms of existing [interconnection] agreements but also the extent to which mass market switching and dedicated transport should remain available under state law" (AT&T Brief at 9 (quoting FCC Motion to Stay at 9); Conversent Brief at 9-10; see also Joint Parties Brief at 22). The CLECs argue that mandating unbundling under state law would be consistent with the Department's policy goals of promoting competitive telecommunications markets (MCI Brief at 3, citing IntraLATA Competition, D.P.U. 1731, at 25 (1985); see also Joint Parties Brief at 21).

Moreover, the CLECs claim that even if the FCC were to find that CLECs were not "impaired" without access to a particular element, the Department would still have authority to require unbundling of the element (AT&T Brief at 9-10). The CLECs argue that Section 252(e)(3) preserves the ability of states to impose state law requirements when reviewing interconnection agreements so long as it does not invoke state law to create barriers to entry in violation of Section 253 (AT&T Brief at 10, citing Puerto Rico Tel. Co. v. Telecom Reg. Bd. of Puerto Rico, 189 F.189 F.3d 1, 14 (1st Cir. 1999); Southwestern Bell Tel. v. Public Util. Comm'n of Texas, 208 F.3d 475, 481 (5th Cir. 2000); AT&T Comms. of NJ v. Bell Atlantic-NJ, Inc., Civ. No. 97-CV-5762(KSH), 2000 WL 33951473, at *14 (D.N.J. June 6, 2000); see also Joint Parties Brief at 19-20). The CLECs further argue that the Telecommunications Act envisions an active role for states to impose unbundling requirements that "go beyond the minimum set of requirements, or floor, set by federal law" (AT&T Brief at 10). The CLECs note that Section 261(c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part" (AT&T Brief at 10). Further, the CLECs note that Section 601(c) of the Telecommunications Act establishes a special rule of construction for interpreting the Act, providing that the terms of the Act "shall not be construed to modify, impair, or supersede . . . State or local law unless expressly so provided" (AT&T Brief at 11). The CLECs argue that federal regulation does not preempt the field unless it is so pervasive as to leave "no room" for parallel state requirements (AT&T Brief at 11, citing Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985)). AT&T maintains that there is no field preemption here, where Congress explicitly reserved a role for the states in regulating local telecommunications competition (AT&T Brief at 11). Moreover, AT&T contends that because nothing in the Act "prohibits" an ILEC from offering the combined UNEs at issue, no conflict between federal and state law could exist (AT&T Brief at 11-13, citing Southwestern Bel Tel. Co. v. Waller Creek Comms., Inc., 221 F.3d 812 (5th Cir. 2000); In re Petition of Verizon New England, 173 Vt. 327, 795 A.2d 1196, 1200 (2002), Southern New England Telephone Co. v. Department of Pub. Util. Control, 261 Conn. 1, 36 (2002)).

Verizon, on the other hand, claims that the Telecommunications Act preempts state commissions from imposing unbundling obligations outside of the Section 251 process and that no unbundling can be ordered in the absence of a valid impairment finding by the FCC (Verizon Brief at 12). Verizon contends that the D.C. Circuit held that only the FCC has the authority to make that impairment finding under Section 251(d)(2) of the Act (id. at 13, citing 359 F.3d at 565-68). Therefore, Verizon argues, because there is no lawful finding of impairment by the FCC under Section 251(d)(2), "any state commission order requiring unbundling at TELRIC rates would be fundamentally inconsistent with federal law by requiring unbundling where the 1996 Act, by its terms, does not permit it" (id. at 13).

Verizon observes that the Department's jurisdiction to regulate intrastate telecommunications common carriers within Massachusetts is found in Massachusetts General Laws, Chapter 159, and argues that nothing in that Chapter, or anywhere else in the Massachusetts General Laws, purports to give the Department independent authority to impose unbundling obligations that federal courts or the FCC have eliminated (id.). Verizon contends that the Department has recognized that unbundling obligations are determined by federal law (id. at 13-14, citing D.P.U./D.T.E. 96-73, 96-75, 96-80/81, 96-83, 96-94, Phase 4-E at 11 (March 13, 1998); Phase 4-K at 26-27 (May 21, 1999); Alternative Regulation, D.T.E. 01-31-Phase II at 32 n.3 (2003); Verizon New England, Inc., D.T.E. 98-57-Phase III-D at 15-17 (2004)). Therefore, Verizon concludes that the Department cannot lawfully reimpose unbundling requirements that have been eliminated by the D.C. Circuit or the FCC (id. at 14).

Moreover, Verizon argues that the Department has not received an explicit grant of authority under state law to compel Verizon to unbundle its network, because the Department has an express delegation of power over telecommunications utility "services," not over private property rights to a telecommunications utility's facilities and assets (Verizon Reply Brief at 21). Verizon asserts that network unbundling is not a "service," but rather an extraordinary appropriation of Verizon's property rights, which requires Verizon to turn over control and operation of pieces of its network to competitors (id.). Verizon contrasts this general authority over services with the Department's express grant of authority over the restructuring of the electric power industry with respect to the divestiture of generation assets and the development of a competitive market structure for generation services (id. at 23). Verizon argues that because the Department does not have any express delegation comparable to the detailed statutory provisions for electric industry restructuring, the Department therefore does not have implied authority to require unbundling of Verizon's network (id. at 23-24).

Finally, even if preemption were not an issue and the Department had jurisdiction to require unbundling, Verizon argues that it has no current state law obligation to unbundle its network, because the Department has not exercised authority under state law to fashion an unbundling regime (id.). Verizon maintains that the Department has consistently applied federal law in setting Verizon's unbundling obligations, and there is no standard for unbundling solely under state law (Verizon Reply Brief at 24). Verizon argues that the Department cannot simply declare that a state unbundling regime exists; rather, the Department would have to provide notice of its intent to do so and provide parties the opportunity to present testimony and argument on the scope of the Department's authority and the constitutional safeguards, standards, and conditions applicable to unbundling (id.; Verizon Brief at 14 n.16). Further, Verizon contends that unlike the federal unbundling scheme, Chapter 159 applies to all carriers, not just to Verizon (Verizon Reply Brief at 25). If the Department asserts the power under state law to require unbundling of Verizon's network, Verizon argues that the Department must apply that same power to unbundle the networks of other carriers (id.).

b. Analysis and Findings

In determining whether the Department may require Verizon to unbundle network elements, we must first consider whether the Telecommunications Act and federal regulation have preempted state action. The question before the Department is not one of whether Section 251 should be construed to provide express or implied preemption of state regulation. The United States Supreme Court has indicated that Congress "unquestionably" has taken the regulation of local competition away from the states. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999); see also id. at 397. Section 251(d)(1) and (2) require the FCC to determine what network elements should be unbundled, and absent a determination by the FCC that CLECs are impaired without access to such network elements on an unbundled basis, the FCC cannot promulgate regulations requiring them to be unbundled. USTA II, 359 F.3d at 568.

Thus, if the Department may require unbundling pursuant to state law, the Department may do so only if the savings clause of Section 251 preserves such state action. See 47 U.S.C. § 251(d)(3). The savings clause expressly preserves the authority of state commissions to enforce regulations, orders, or policies that are "consistent" with the requirements of Section 251 and do not "substantially prevent implementation" of Section 251 and the purposes of the Telecommunications Act. 47 U.S.C. § 251(d)(3); see also 47 U.S.C. §§ 252(e)(3), 253, 261. The language of the Section 251(d)(3) savings clause does not, however, suggest a congressional intent to save state commission actions that conflict with Section 251 or with the FCC's regulations. Cf. Heinricher v. Volvo Car Corp., 61 Mass.

App. Ct. 313, 316 (2004) (construing preemptive effect of the Federal Traffic and Motor Vehicle Safety Act of 1966); see also Geier v. American Honda Motor Co., 529 U.S. 861, 869 (2000) (holding that savings clause did not save common law rules that "actually conflict" with federal motor vehicle safety standard); AT&T v. Iowa, 525 U.S. at 378 n.6 ("This is . . . a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts . . . ."). Thus, ordinary conflict preemption principles apply. Geier, 529 U.S. at 869. A conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Geier, 529 U.S. at 873-74; Fidelity Sav. & Loan Assn. v. De La Cuesta, 458 U.S. 141, 153 (1982); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

We reject AT&T's suggestion that Section 252(e)(3) preserves the ability of the States to require unbundling where the FCC finds that it is not required (see AT&T Brief at 10). Section 252(e)(3) states that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement." 47 U.S.C. 252(e)(3) (emphasis added). While Section 252 does permit the Department to enforce other requirements of state law in approving or rejecting interconnection agreements, AT&T's reading would discount improperly the preemptive effect of federal regulation under Section 251.

The terms of Section 251 govern the regulation of access to network elements on an unbundled basis. We agree with the CLECs that, where there is a gap, the Department would not be preempted from imposing unbundling requirements if state law provides that authority; but this is the case only so long as that exercise of authority is consistent with Section 251 and does not substantially prevent implementation of the Act.[17] 47 U.S.C. § 251(d)(3). Although the FCC has observed that states would have to determine whether UNEs should be made available under state law in the absence of FCC regulation of network elements (see AT&T Brief at 9, quoting FCC Motion to Stay), the Department's regulation of UNEs would not be unrestricted. Impairment is the "touchstone" of Section 251. USTA I, 290 F.3d at 425. Thus, in the absence of FCC regulation, if state law permits the Department to impose unbundling requirements, we would still need to determine whether CLECs are "impaired."

We have long asserted jurisdiction under state law over Verizon's wholesale common carriage services and facilities used by other carriers to provide retail telecommunications services. Since IntraLATA Competition, D.P.U. 1731 (1985); and prior to the enactment of the Telecommunications Act of 1996, the Department encouraged the development of

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[17] We distinguish the status of the elements that were subject to rules vacated by USTA II from other elements for which the FCC's rules have not been vacated, such as the rules on enterprise switching and packet switching. Where the FCC has found affirmatively that CLECs are "not impaired" and that ILECs are therefore not obligated to provide the network elements as UNEs under Section 251, a contrary finding of impairment would conflict with federal regulation. See, e.g., Verizon New England, Inc., D.T.E. 98-57-Phase III-D at 15 (holding that state mandated unbundling of packet switching would be contrary to FCC's packet switching rules); D.T.E. 03-59, at 19 (holding that TELRIC pricing is unwarranted where the proper pricing for enterprise switching is to be market-driven).

competitive markets in long distance and competitive exchange access by approving wholesale tariffs for wholesale special access and interconnections services and facilities. See, e.g., IntraLATA/Local Exchange Competition, D.P.U. 94-185, Vote to Open Investigation at 2 (Jan. 6, 1995) (reviewing previous efforts to develop competition); New England Telephone and Telegraph Company, D.P.U. 90-206-B/91-66-B (1993) (approving stipulation of terms of collocation tariffs). In D.P.U. 90-206-B/91-66-B, Verizon stipulated that the Department would have continuing jurisdiction to enforce terms of an agreement between Verizon and other carriers concerning Verizon's collocation tariffs and to enforce an agreement that Verizon and the other carriers would continue good faith discussions "regarding other issues related to the services, facilities, and arrangements associated with the provision of additional services within the Commonwealth . . . ." D.P.U. 90-206-B/91-66-B at 7 (emphasis added). Thus, Verizon itself has acknowledged that the Department may exercise jurisdiction over its facilities pursuant to G.L. c. 159.

We reject Verizon's claim now that we lack jurisdiction based on its novel argument that regulation of network elements constitutes an appropriation of private property rather than regulation of "telecommunications services." The Department's general jurisdiction extends to the regulation of the "transmission of intelligence" by telephone lines or any other method of communications, "including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith." G.L. c. 159, § 12. The Department also has specific jurisdiction over rates and "regulations, practices, equipment, appliances, or service" of any common carrier, which necessarily includes Verizon.

G.L. c. 159, §§ 14, 16. We find therefore that our state law authority over network facilities is an explicit grant of statutory authority to regulate network elements. Contrary to Verizon's argument that we have no jurisdiction to require unbundling because the Department's statutory authority under Chapter 159 does not include comprehensive provisions directing the Department to restructure the telecommunications industry, as the Legislature provided in the Electric Industry Restructuring Act, St. 1997, c. 164, the lack of specific mandates from the Legislature to promote competition in the telecommunications industry does not compel us to find that we may not promote competition, given our authority to regulate network elements.

Further, Verizon itself urges the Department "to ensure that carriers abide by the terms of their interconnection agreements, including those that allow Verizon MA to discontinue, upon notice, elements that it no longer has a legal obligation to provide under Section 251(c) of the Act" (Verizon Brief at 10). In enforcing terms of interconnection agreements, the Department exercises its jurisdiction over network elements under state law to implement FCC regulations regarding UNEs where the Telecommunications Act preserves state action.

Verizon is correct, however, that we have not required it to unbundle network elements solely under state law. Although we opened an investigation, in 1995, into unbundled network elements under state law, we did not complete that investigation, because the intervening passage of the Telecommunications Act "fundamentally changed the process by which [access to unbundled enterprise switching] would be resolved." D.P.U. 94-185, Interlocutory Order on Appeals from Hearing Officers' Ruling on Procedural Schedule at 7 (June 4, 1996). Since then, we have investigated access to UNEs pursuant to the FCC's rules, rather than conducting unbundling investigations independently under state law. Thus, we have not yet made any finding as to whether Verizon would have an obligation to unbundle enterprise switching, or any other network element, independently under state law in the absence of federal rules under the "impairment" standard, or by any other standard, and we could not do so without completing full investigation. As we stated above, although we could open a new unbundling investigation under state law, we decline to do so, because it would be a waste of the Department's and the carriers' resources, given that the FCC is expected to issue new unbundling rules soon.

3. Carrier of Last Resort

> *In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport, do Verizon's obligations as carrier of last resort require it to offer UNEs? See Intra-LATA Competition, D.P.U. 1731, at 76 (1985).*

a. Positions of the Parties

In IntraLATA Competition, D.P.U. 1731, at 76, the Department designated Verizon (then, New England Telephone Company) as a "carrier of last resort" with respect to local exchange services in Massachusetts with an obligation to serve an exchange "if a particular area or exchange is either left without or not provided with telephone service." AT&T argues that while the Department's D.P.U. 1731 Order was concerned primarily with ensuring universal telephone service to retail customers, its principles can and should be extended to wholesale customers (AT&T Brief at 19-20). AT&T asserts that Verizon is the only carrier capable of providing access to UNEs throughout large portions of Massachusetts (id. at 20). Therefore, AT&T concludes that Verizon is a carrier of last resort for wholesale customers (id.). Verizon responds that the Department's determination in D.P.U. 1731 pertained exclusively to retail, not wholesale services, and that it would be incorrect to extrapolate those findings to wholesale services (Verizon Brief at 15). No other carrier responded to this question.

b. Analysis and Findings

Both AT&T and Verizon acknowledge that the Department's intent in designating a "carrier of last resort" was to "ensure the continuation of our goal of universal service." See D.P.U. 1731, at 73-76. In turn, the Department has defined its goal of universal service as "ensur[ing] the continued ability of the vast majority of the population in Massachusetts to obtain basic telecommunications services." Id. at 21. Verizon is correct that in D.P.U. 1731, we designated Verizon as a carrier of last resort for only "local exchange service and intra-LATA MTS, WATS, and PLS," and not for any type of wholesale offerings. Id. at 75. Moreover, when we considered AT&T, at the time, to be a carrier of last resort for inter-LATA services because competing interexchange carriers were dependent upon AT&T's leased lines for origination and termination of calls, we did not order AT&T to offer leased lines in all exchanges. Id. at 72-74. Rather, we ordered AT&T to offer basic inter-LATA telephone service to ensure that end users would have inter-LATA service.[18] Id. at 74.

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[18] Note, however, that while Verizon remains a carrier of last resort for intrastate local exchange services, we have since reclassified AT&T as a nondominant carrier for intraLATA and interLATA toll services. AT&T Communications of New England, Inc., D.P.U. 95-131 (1996).

Similarly, we conclude that it is inappropriate to extend Verizon's designation as carrier of last resort (that is, Verizon's obligation to ensure universal service for retail customers) to include wholesale access.[19] Even if we accept AT&T's contention that Verizon is "the only carrier capable of providing [wholesale customers] access to UNEs throughout large portions of Massachusetts" (AT&T Brief at 20), our goal of ensuring that no community in Massachusetts is without basic telephone service will continue to be met, so long as Verizon, the dominant carrier, continues to offer local exchange service and intra-LATA MTS, WATS, and PLS.

4. Alternative Regulation

In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport, do the terms of Verizon's Alternative Regulation Plan indirectly require it to continue providing mass market switching, UNE-P, dedicated transport, and high-capacity loops at TELRIC rates, and if so, what would be the consequences should Verizon discontinue providing any of the above TELRIC-based rates?

a. Positions of the Parties

According to AT&T, in D.T.E. 01-31, the Department found that traditional rate of return regulation was no longer necessary for those retail business services that CLECs can compete against with their own UNE-based retail services, and that by leasing UNEs, CLECs can enter the market with the same costs as Verizon, which is one of the prerequisites for a market to be "contestable" (AT&T Brief at 21). AT&T asserts that if unbundled switching and

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[19] We are unaware of any other state that has sought to extend carrier of last resort obligations to network element provisioning.

UNE-P are no longer available, large portions of the enterprise market will no longer be contestable (id.). AT&T argues that the Department should investigate whether Verizon's Alternative Regulation Plan established in D.T.E. 01-31 requires it to continue to provide UNE-P for enterprise customers in exchange for the retail pricing flexibility that the Department granted (id. at 22).

Similarly, both Conversent and MCI argue that the availability of UNEs was the foundation upon which the Department based the Alternative Regulation Plan (Conversent Brief at 21; MCI Brief at 4-5). Conversent argues that the Department should require Verizon to maintain the availability of UNEs in the same manner as when the Alternative Regulation Plan was established and should require their continued availability throughout the duration of the Plan (Conversent Brief at 21). MCI argues that if Verizon discontinues providing UNEs at TELRIC, the Department can reasonably conclude that a re-examination of Verizon's Alternative Regulation Plan is warranted (MCI Brief at 4). While the re-examination is underway, argues MCI, the Department should impose upon Verizon an obligation to continue offering UNEs at TELRIC (id. at 4-5).

Verizon argues that it did not commit to offering UNEs or UNE-P as a condition of the Department's adoption of the Alternative Regulation Plan (Verizon Brief at 16-17). Verizon maintains that while the Department stated that UNE-P "contributed" to the competitiveness of the business market, it did not rule that Verizon must continue to provide such arrangements regardless of any change in federal law (id. at 16). Rather, Verizon argues that the

Department considered the availability of UNE-P to be one of several factors to take into account in determining the appropriate degree of regulation (id. at 17).

b. Analysis and Findings

We agree with CLECs that the availability of UNEs and UNE-P as a mode of competitive market entry was a consideration in the development of Verizon's Alternative Regulation Plan. See D.T.E. 01-31-Phase I, at 60-62 (May 8, 2002). In D.T.E. 01-31, we determined that UNE-based services exert more downward pressure on Verizon's retail prices than resold services which are not priced at incremental cost. Id. at 60 n.36. That is, the availability of UNEs contributed to costless market entry and exit (i.e., "contestability"). Id. at 60, 65-67. Competition from carriers serving customers at the same incremental cost as Verizon would drive retail prices to their economically efficient levels at the incremental cost. Id. at 61. We determined that resellers, however, do not exert sufficient competitive pressure, because a reseller's cost floor is tied to Verizon's retail price. Id. at 62. Moreover, the pricing flexibility that we granted was limited to those services which were contestable on a UNE basis. Id. at 92. We also stated that, subsequent to our adoption of the Alternative Regulation Plan, should competitive markets fail to provide a result equivalent to conventional regulatory means, we would redress the situation pursuant to Chapter 159. Id. at 95. We also required Verizon to submit an annual report detailing the extent of competition for its retail services in Massachusetts in order to inform ourselves about changes in competitive markets. Id. at n.59.

However, we did not determine in D.T.E. 01-31-Phase I that Verizon was prohibited by its Alternative Regulation Plan from withdrawing UNEs. Rather, we determined that the availability of UNEs was evidence supporting the conclusion that there was sufficient competition to ensure that Verizon's retail rates for business services will be just and reasonable. Within the context of this proceeding, which is limited to the implementation of the Triennial Review Order, we determine that re-examining the Alternative Regulation Plan is beyond the scope of this proceeding. We also find that Verizon's Alternative Regulation Plan does not create a separate obligation to offer UNEs.

Further, while the pricing may change, there is no indication that the network elements in question will be unavailable to competitors. It remains to be seen whether CLECs serving the market with facilities obtained either by the new terms of their post-USTA II interconnection agreements, by commercial agreements, Section 271 arrangements, or by self-provisioning[20] will exert sufficient market pressure on Verizon's retail rates. We will continue to monitor the extent of competitive facilities in Massachusetts and their controlling

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20 We have observed that an affirmative finding by the FCC that requesting carriers are not impaired without access to UNEs at TELRIC is a finding that there are no operational or economic barriers to entry with respect to those elements, and that therefore, the potential threat of market entry by competitors would subject Verizon's pricing to competitive forces. See, e.g. D.T.E. 03-59, at 19 (holding that freezing enterprise switching rates at TELRIC is unwarranted given the FCC's finding that the proper pricing should be market driven). This reasoning does not necessarily apply to mass market switching and high capacity loops and transport, where the FCC's findings and unbundling rules have been vacated. Verizon must continue to demonstrate that sufficient market pressure on Verizon's retail rates exists.

effect on Verizon's retail prices to determine whether any adjustments to Verizon's Alternative Regulation Plan are necessary.

5. Hot Cuts

In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport, should the Department proceed with a separate hot cuts investigation under state law? If so, may the record already compiled in D.T.E. 03-60 be incorporated into such a proceeding? Would the scope of such an investigation and standard of review of proposed hot cut processes be different from the investigation in D.T.E. 03-60?

a. Positions of the Parties

(1) CLECs

AT&T argues that legal authority allows, and public interest compels, the Department to continue with its investigation of a high volume hot cut process (AT&T Brief at 17-18). AT&T opposes any approach to hot cuts in Massachusetts that does not include a "large job" process and an opportunity for the implementation of the improvements recommended in the recent proceeding before the New York Public Service Commission ("NYPSC") (id. at 17). AT&T argues, however, that under certain circumstances, it would not oppose a stay of the hot cut proceedings in Massachusetts pending the outcome of the New York case (id. at 18). Conversent argues that the Department should resume its investigation of Verizon's WPTS hot cut process regardless of whether the Department continues its investigation of the batch and large job hot cut processes in this docket (Conversent Brief at 24). The Joint CLECs recommend that the Department go forward with the hot cuts portion of its D.T.E. 03-60 investigation either in this docket or incorporate the D.T.E. 03-60 hot cuts record into a new hot cuts proceeding (Joint CLECs Brief at 5). The Joint Parties argue that the Department should continue its investigation of Verizon's hot cut procedures, because in order for CLECs to have meaningful access to Verizon's unbundled loops, CLECs must have effective hot cut procedures in place (Joint Parties Brief at 22-23). Therefore, the Joint Parties recommend that the factual record in the D.T.E. 03-60 hot cuts investigation be incorporated into a further investigation to determine whether CLECs' ability to obtain access to Verizon's unbundled loop facilities is impaired by Verizon's existing hot cut procedures (id. at 23). MCI argues that the Department should move forward with its hot cuts investigation, using the record developed in D.T.E. 03-60 as a starting point for a further investigation (MCI Brief at 6).

(2) Verizon

Verizon argues that because the D.C. Circuit vacated the authority that the Triennial Review Order subdelegated to the States for the nine-month impairment proceedings, ILECs are no longer required to propose a batch process to handle the volume of hot cut migrations expected following the elimination of UNE-P, and there is therefore no need for the Department to examine whether Verizon's proposed batch hot cut process satisfies the vacated FCC requirement (Verizon Brief at 23-24). Verizon asserts that it will begin offering a batch hot cut process to CLECs in Massachusetts soon; and while Verizon argues that the Department may set rates for this process if the industry cannot come to an agreement, at this stage the Department should allow matters to develop without an active, litigated proceeding (id. at 24). Verizon notes that a proceeding independent of the Triennial Review Order, in which the NYPSC has been considering the feasibility and pricing of a bulk or batch hot cut process, has been underway since before the Triennial Review Order (id.). Verizon argues that the NYPSC is expected to address whether Verizon's basic, large job, and batch processes are scalable enough to accommodate the volume of hot cut orders anticipated if the UNE-P is eliminated, as well as the costs and appropriate rates for each process (id. at 24-25). Verizon asserts that most of the CLECs participating in this case are also involved in the New York proceeding, and that the most reasonable course for the Department is to let industry members develop a uniform batch hot cut process based on the decisions made in the New York proceeding (id. at 25). Verizon argues that it is more efficient for Verizon and CLECs for Verizon to have consistent, company-wide wholesale service, practices, policies, and operations support systems (id.). Verizon encourages the Department to allow a such a uniform process to develop without active litigation at this stage as the Department can address any remaining issues after the process has been developed in New York (id.). Verizon argues that waiting for a New York decision renders it more likely that the parties will be able to reach an agreement for Massachusetts, or at least reduce the scope of disputed issues, and the Department will also gain time to consider the effects of any interim rules the FCC may issue regarding the batch hot cut issue (id. at 25-26).

b. Analysis and Findings

As noted earlier in this Order, prior to the Department's stay of the proceeding, our hot cuts investigation in D.T.E. 03-60 included evaluation of the following three processes: (1) batch; (2) large job; and (3) wholesale provisioning tracking system ("WPTS"). The WPTS investigation was imported from the Department's UNE Rates Proceeding, D.T.E. 01-20. See D.T.E. 03-60, Hearing Officer Memorandum at 2 (Nov. 24, 2003) (expanding the D.T.E. 03-60 investigation to review WPTS for the purpose of adopting a more efficient manual hot cut process). The batch and large job hot cut investigations were undertaken pursuant to the FCC's Triennial Review Order. The Department consolidated its WPTS investigation with the batch hot cut investigation in D.T.E. 03-60 for administrative efficiency; however, we indicated in the Interlocutory Order staying the D.T.E. 03-60 proceeding that we would consider "peeling off" our WPTS investigation as independent from any obligations arising under the Triennial Review Order. D.T.E. 03-60, Interlocutory Order at 15-16 (April 2, 2004). We agree with the CLECs that we should proceed with our WPTS investigation, because the Department has already developed the record on WPTS in the D.T.E. 03-60 docket and could conduct hearings on WPTS once that record is refreshed. We will continue our WPTS investigation in a separate docket, and, upon request by any party, we will incorporate into the record by reference the WPTS information compiled in D.T.E. 03-60 thus far. Parties that have participated in our D.T.E. 03-60 hot cuts investigation will be made parties to the new WPTS docket upon their request.

With regard to the batch and large job hot cuts investigations that we initiated in this docket as a result of the Triennial Review Order, we agree with Verizon that the D.C. Circuit's decision in USTA II eliminated Verizon's obligation to submit batch and large job hot cuts proposals under the Triennial Review Order. Therefore, it is unnecessary to continue our investigations in D.T.E. 03-60 on that basis. We hereby close the investigations of these issues by way of this Order. However, we note the recommendations of both AT&T and Verizon to evaluate the recent NYPSC decision regarding hot cuts for possible adoption in Massachusetts. The NYPSC investigation, initiated prior to the FCC's Triennial Review Order, has resulted in a recent order establishing rates for three different hot cut migration processes in New York. See Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (*i.e.*, Bulk) Basis, Case 02-C-1425, Order Setting Permanent Hot Cut Rates (August 25, 2004). The NYPSC Hot Cuts Order also anticipated the creation of performance standards to ensure that Verizon efficiently handles such jobs in the future. We agree with AT&T and Verizon that both CLECs and ILECs can benefit from regulatory requirements that are similar in neighboring states, and, therefore, agree to evaluate the NYPSC decision for possible application in Massachusetts with the understanding that Massachusetts-specific conditions may necessitate certain alterations to the New York decision prior to its adoption in Massachusetts. As an initial step in this evaluation, the Department requests that carriers confer and propose a joint recommendation to the Department as to the portions of the NYPSC decision the carriers seek to have adopted in Massachusetts. Following this initial, informal, collaborative approach, the Department will then determine the appropriate procedure to continue its evaluation. Carriers are requested to submit the joint recommendation to the Department by January 31, 2005, after which, we will open a new docket to address adoption of the New York hot cut processes in Massachusetts.

6. Wholesale Tariff Obligations

In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport, what are Verizon's obligations pursuant to its wholesale tariff?

a. Positions of the Parties

AT&T argues that Verizon remains obligated to provide all UNEs listed in its wholesale tariff under the terms and conditions therein until the Department revises the tariff (AT&T Brief at 40-42). AT&T points out that in Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4-P at 8 (Jan. 6, 2000), the Department stated that "it is unacceptable for [Verizon] to offer [UNE-P] and to have the unilateral right to withdraw it without review by the Department" (AT&T Brief at 41). AT&T states that the Department therefore required Verizon to provide UNE-P under its wholesale tariff as well as under its interconnection agreements so that Verizon "cannot act unilaterally" to stop providing UNE-P at TELRIC (id.).

The Joint CLECs argue that Verizon remains obligated to provide unbundled transport and switching, not just under the terms of its interconnection agreements, but also its wholesale tariff (Joint CLECs Brief at 1). The Joint CLECs maintain that if Verizon believes that it should no longer be required to tariff a particular network element, Verizon may propose tariff amendments for the Department's review and approval, as Verizon has proposed, for example, in D.T.E. 04-73 (id. at 6 n.6). The Joint CLECs argue that until proposed amendments are approved, Verizon remains obligated to provide service in accordance with the terms of its tariffs (id. at 6).

Sprint argues that in addition to Verizon's federal obligations, Verizon is also subject to the terms of its wholesale tariff and must offer those terms on a nondiscriminatory basis (Sprint Brief at 7). Sprint maintains that Verizon may not change the terms of its wholesale tariff without Department approval (id.).

Conversent argues that to the extent that the FCC's interim rules are different from Verizon's wholesale tariff, the Department should continue to enforce the tariff rather than the interim rules to ensure the stability of Massachusetts telecommunications markets (Conversent Brief at 2-3). Conversent argues that Verizon's wholesale tariff requires it to provide interoffice transmission facilities, local loops including DS1 and DS3 high capacity loops, local switching, expanded extended local loops, UNE-P and combinations, and dark fiber (id. at 5, citing M.D.T.E. No. 17, Part B, §§ 2, 5, 5.3, 6, 13, 15, 16, 17). These obligations, argues Conversent, are separate from Verizon's obligations under any interconnection agreement, and, therefore, are unaffected by change of law provisions within those interconnection agreements (id. at 6). In addition, Conversent argues that, if Verizon seeks to amend its wholesale tariff to eliminate UNE provisioning, the Department should suspend and investigate the revisions, as the Department recently did in D.T.E. 04-73 (id. at 11). If and when final FCC rules specifically supersede state tariff requirements, Conversent argues that the Department should closely scrutinize the rates for substitute services and should set a reasonable transition timetable (id. at 21-22). Conversent asserts that state law and tariffs provide a basis for the Department to unbundle UNEs as specified in tariff M.D.T.E. No. 17 (id. at 5-6).

The Joint Parties argue that the Department has the authority to supervise Verizon's UNE provisioning pursuant to Verizon's wholesale tariff, regardless of whether the obligations arise under Section 251 or Section 271 (Joint Parties Brief at 2). The Joint Parties argue that the Department must, consistent with the requirements of the Telecommunications Act and state law, reject any modification to Verizon's wholesale tariff offerings that would "end-run" its existing obligations to offer network elements, such as local switching, dedicated transport, and high-capacity loop facilities (id. at 15-16).

Verizon states that it intends to update its current interconnection tariff to conform to the USTA II decision and the FCC's Triennial Review Order and asserts that the Department is not permitted to impose any different or additional requirements under the guise of a tariff (Verizon Reply Brief at 33). Verizon argues that it cannot be required to maintain a state interconnection tariff on an ongoing basis, because a state tariffing requirement would interfere with the procedures established by the Telecommunications Act (id.). In addition, Verizon maintains that it is not required under Massachusetts law to file such tariffs (id.). Verizon claims that the Section 251 elements covered by interconnection agreements between ILECs and competing carriers are governed by the 1996 Act and subject to FCC authority, and therefore, it is it is redundant to file state tariffs and unnecessary to ensure compliance with non-discrimination statutes (id.). Verizon argues that any state requirement that Verizon file or maintain an interconnection tariff would be inconsistent with federal law (id. at 34).

b. Analysis and Findings

In Consolidated Arbitrations, Phase 4-P, the Department was concerned that Verizon's voluntary commitment to provide UNE-P would not provide the market certainty needed to support the development of conditions for a competitive local exchange market in Massachusetts, if Verizon had the right unilaterally to withdraw the service without review by the Department. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4-P at 7 (Jan. 6, 2000). Therefore, the Department required Verizon to include UNE-P service offerings in its tariff. Id. at 8.

Verizon may not unilaterally change the terms of its wholesale tariffs without Department approval, because "[n]o common carrier shall, except as otherwise provided in [Massachusetts General Laws, Chapter 159], charge, demand, exact, receive or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the department and in effect at the time." G.L. c. 159, § 19. The terms of M.D.T.E. No. 17, currently in effect, require Verizon to offer interoffice transmission facilities,[21] local loops including DS1 and DS3 high capacity loops,[22] local

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[21] M.D.T.E. No. 17, Part B, § 2.

[22] M.D.T.E. No. 17, Part B, § 5.

switching,[23] EELs,[24] UNE-P and other UNE combinations,[25] and dark fiber.[26] We find that Verizon remains obligated to provide these UNEs under M.D.T.E. No. 17, until that tariff is changed.[27] Verizon has acknowledged that obligation by continuing to provide CLECs with enterprise switching under its wholesale tariff while its proposed tariff revision to eliminate enterprise switching UNEs is under suspension in D.T.E. 04-73, which we address later in this Order.

With respect to the UNEs that were de-listed by USTA II, if the FCC's Interim Rules Order maintaining the status quo is vacated, or if the FCC finds that CLECs are not impaired with respect to these UNEs and the FCC's final rules provide that these UNEs are not required to be unbundled under Section 251, Verizon may propose tariff revisions to conform with federal and state law. As we stated in our discussion of federal preemption above, however, our determinations in approving or denying such proposed revisions are required to be "consistent with" the requirements of Section 251, and "not substantially prevent implementation" of Section 251 and the purposes of the Telecommunications Act. 47 U.S.C. § 251(d)(3).

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[23] M.D.T.E. No. 17, Part B, § 6.

[24] M.D.T.E. No. 17, Part B, § 13.

[25] M.D.T.E. No. 17, Part B, §§ 15, 16.

[26] M.D.T.E. No. 17, Part B, § 17.

[27] Verizon's obligations with respect to carriers that take Verizon's services subject to interconnection agreements are governed by the terms of specific interconnection agreements, not M.D.T.E. No. 17, unless the tariff has been incorporated by reference. See Verizon New England, Inc., D.T.E. 98-57-Phase-I at 20-22 (Mar. 24, 2000).

7. Bell Atlantic/GTE Merger Order

Should the Department seek a declaratory ruling from the FCC as to whether the BA/GTE Merger Order requires Verizon to continue to provide mass market switching, UNE-P, dedicated transport, and high capacity loops at TELRIC?

a. Positions of the Parties

(1) AT&T

AT&T observes that the Department routinely interprets FCC rulings, orders, decisions, and rules without referring the matter to the FCC for clarification or adjudication (AT&T Brief at 44-45). AT&T argues that there is no basis for the Department not to make an independent decision regarding the meaning of the BA/GTE Merger Order[28] to resolve the present question (id. at 45-46). Accordingly, AT&T argues that if Verizon seeks to demonstrate that a change of law is "material" or "materially affects" rights and obligations, Verizon must demonstrate that the BA/GTE Merger Order does not render immaterial any purported change of law invoked (id. at 46).

(2) Joint CLECs

The Joint CLECs state that in light of the Interim Rules Order requiring all ILECs to preserve the vacated UNEs, it is unnecessary to seek clarification from the FCC at this time

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28 In re Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket 98-184, Memorandum Opinion and Order, FCC 00-221 (rel. June 16, 2000) ("BA/GTE Merger Order"). The BA/GTE Merger Order placed a number of conditions on the merger, one of which was that Verizon (then, Bell Atlantic) was obligated to continue providing certain UNEs at TELRIC rates. Id., app. D at ¶ 39. Whether this obligation has expired is the issue before us.

(Joint CLEC Brief at 6). The Joint CLECs suggest further that the Department need not rely on the FCC to enforce the merger conditions, because they conditions provide for state enforcement: "Bell Atlantic/GTE shall not be excused from its obligations under these federal Conditions on the basis that a state commission lacks jurisdiction under state law to perform an act specified or required by these Conditions . . . ." (id. at 6 n.6 (quoting BA/GTE Merger Order, app. D at ¶ 63)).

(3) Joint Parties

The Joint Parties argue that the Department need not seek a declaratory ruling from the FCC, because the continuing effect of the BA/GTE Merger Order is evident (Joint Parties Brief at 7-8). The Joint Parties argue that the BA/GTE Merger Order requires Verizon to provide to all requesting carriers UNEs and combinations including UNE-P, transport and high-capacity loop facilities, at TELRIC rates, without interruption, until all legal challenges to the FCC's unbundling rules are finally resolved (id., citing BA/GTE Merger Order at ¶ 316). Moreover, they assert that the Merger Order clearly states that Verizon's unbundling obligations are not subject to an expiration date (id.).

The Joint CLECs maintain that the condition of a "final and non-appealable"order is not satisfied, and they argue that Verizon must maintain the status quo until the FCC's "final and non-appealable" unbundling rules are in place" (id.). Specifically, they state that in USTA II, the D.C. Circuit vacated and remanded the FCC's rules for further proceedings, and the FCC has interim rules and permanent rules are forthcoming (id. at 8). Therefore, they argue that USTA II does not constitute a "final and non-appealable" judicial decision that would cause existing unbundling requirements imposed by the Merger Order to be superseded (id.).

(4) MCI

MCI argues that the BA/GTE Merger Order requirements are clear and that the Department need not seek a declaratory ruling (MCI Brief at 6). Verizon, not the Department, should be the party seeking relief from the FCC, according to MCI (id.).

(5) Sprint

Sprint argues that a declaratory ruling is unnecessary and that Verizon remains obligated to provide UNEs, including unbundled switching and dedicated transport, pursuant to the BA/GTE Merger Order (Sprint Brief at 7). Sprint asserts that both the UNE Remand Order and the Line Sharing Order were remanded back to the FCC, which then consolidated the remand into the Triennial Review proceeding (id. at 8; USTA I). Sprint states that the FCC sought a stay of USTA I to allow it to address the remanded issues in the Triennial Review Order (id. at 8). The D.C. Circuit granted motions to stay the effect of USTA I through February 20, 2003 (id., citing USTA v. FCC, No. 00-1012, Order (D.C. Cir. Sept. 4, 2002); USTA v. FCC, Nos. 00-1012, 00-1015, Order (D.C. Cir. Dec. 23, 2002). According to Sprint, USTA II vacated and remanded the Triennial Review Order for further deliberations, and therefore, there has been no final and non-appealable order concerning Verizon's unbundling obligations (id.).

Sprint disputes Verizon's claim that the BA/GTE Merger Order sunset provisions apply (id.). Sprint states that the opening clause of the sunset provision applies "[e]xcept where other termination dates are specifically established herein . . . ." (id., citing BA/GTE Merger Order, app. D at ¶ 64). Sprint argues that ¶ 39 of the BA/GTE Merger Conditions provide a specific provision for termination of Verizon's UNE obligations and that the "except where" proviso of the sunset clause applies (id. at 8-9).

(6) Verizon

Verizon argues that the Department need not seek clarification of the BA/GTE Merger Order because the merger conditions expired in July 2003, 36 months after the BA/GTE merger closed (Verizon Brief at 29, citing BA/GTE Merger Order, app. D at ¶ 64). Verizon argues that even if the condition did not then sunset, the condition ceased to be effective because Verizon's obligation to provide UNEs under the UNE Remand Order and the Line Sharing Order lasted "until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory" (id. at 30, citing BA/GTE Merger Order at ¶ 316, app. D at ¶ 39).

Verizon argues that USTA I, which took effect on February 20, 2003, constitutes a final and non-appealable judicial decision that the prior rules had no force and effect as of the date that certiorari was denied, March 24, 2003 (id., citing Worldcom, Inc. v. U.S. Telecom Ass'n, 538 U.S. 940 (2003) (denying certiorari)). Verizon notes the FCC's own recognition that once USTA I, which vacated both the UNE Remand Order and the Line Sharing Order, "is final and no longer subject to further review, or the new rules adopted in [the Triennial Review Order] become effective, the legal obligation upon which the existing interconnection agreements are based will no longer exist," and that it would be "unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of [the Triennial Review Order] (id. at 31, citing Triennial Review Order at ¶ 705). Therefore, Verizon argues that because it is clear that the Triennial Review Order does not perpetuate unbundling obligations (id.).

b. Analysis and Findings

The sunset provision of the BA/GTE Merger Conditions provide as follows:

> Except where other termination dates are specifically established herein, all Conditions set out in this Appendix, except for the Conditions requiring Bell Atlantic/GTE to provide Advanced Services through one or more separate affiliates, as set out in Section I, shall cease to be effective and shall no longer bind Bell Atlantic/GTE in any respect 36 months after the Merger Closing Date, unless the Commission orders that a Condition or Conditions be extended for noncompliance reasons in accordance with Paragraph 59 above. Unless specifically stated otherwise, it is intended that each of the Conditions will generate 36 months of benefit. Since some of the Conditions will not become effective or operational until sometime after the Merger Closing Date, such Conditions will remain in effect (as specified) longer than 36 months after the Merger Closing Date.

BA/GTE Merger Order, app. D at ¶ 64. Unless "specifically established" in the Merger Conditions, the Conditions expired in July 2003. The sunset clause recognizes, however, that "[s]ince some of the Conditions will not become effective or operational until sometime after the Merger Closing Date, such Conditions will remain in effect (as specified) longer than 36 months after the Merger Closing Date." Id. (emphasis added). Thus, even the provisions from which the CLECs assert that Verizon's obligations have remained in effect must be read to provide a specific sunset.

The provision upon which the CLECs rely provides:

> Bell Atlantic/GTE shall continue to make available to telecommunications carriers, in the Bell Atlantic/GTE Service Area within each of the Bell Atlantic/GTE States, the UNEs and UNE combinations required in [the UNE Remand Order]) and [the Line Sharing Order] in accordance with those Orders until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area. The provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively.

BA/GTE Merger Order, app. D at ¶ 39; accord. BA/GTE Merger Order at ¶ 316. There appears to be some ambiguity as the provision gives two expiration dates: either on the date of a final, non-appealable judicial decision that ILECs are not required to provide UNEs, or on the date of a "final and non-appealable Commission order in the UNE Remand and Line Sharing proceedings, respectively." Under either interpretation, however, we find that the obligation to provide UNEs under the Bell Atlantic/GTE Merger has expired. The D.C. Circuit rejected the FCC's definition of impairment in USTA I. This judicial decision, invalidating the unbundling scheme fashioned under the UNE Remand Order and the Line Sharing Order, and therefore eliminating the requirement of providing UNEs until the FCC makes a lawful finding of impairment, became final when the Supreme Court denied certiorari of USTA I on March 24, 2003. Even if we were to consider USTA I to have perpetuated Verizon's obligation to provide UNEs under the BA/GTE Merger Order by remanding both proceedings to the FCC, we view the issuance of Triennial Review Order as a final, non-appealable Commission order in the UNE Remand and Line Sharing proceedings, because on appeal of the Triennial Review Order, the vacatur by USTA II cannot have resulted in a remand to reconsider the UNE Remand and Line Sharing rules; the Triennial Review Order's new rules replaced the previous rules. Thus, the Triennial Review Order was a final FCC order that extinguished the two previous orders. Accordingly, the Department finds that Verizon's obligation to provide UNEs pursuant to the terms of the Bell Atlantic/GTE Merger Conditions expired no later than 30 days after publication[29] of the Triennial Review Order. Therefore, we find that the BA/GTE Merger Order does not provide an independent obligation to continue offer the de-listed UNEs.

8. Section 271 Obligations

Does Section 271 of the Telecom Act require Verizon either directly or indirectly, by virtue of the trade-offs under the Act, to continue to provide de-listed UNEs at TELRIC?

a. Positions of the Parties

(1) AT&T

AT&T argues that Section 271 requires Verizon to continue provisioning certain UNEs, including enterprise switching, regardless of whether those UNEs are subject to unbundling under Section 251 (AT&T Comments at 16-17, citing Triennial Review Order at ¶ 653). AT&T maintains that so long as Verizon offers interLATA services, Verizon is obligated under Section 271 to provide unbundled local circuit switching. Moreover, AT&T claims that the pricing standard under Section 271 (i.e., the "just, reasonable, and nondiscriminatory" standard provided under Sections 201 and 202 of the Act) requires Verizon to provide de-listed UNEs at TELRIC rates (AT&T Brief at 48-55). AT&T argues that if Verizon were permitted

29 68 Fed. Reg. 52,276 at ¶ 830 (Sept. 2, 2003).

to price Section 271 elements above their long run incremental cost, the resulting "cost asymmetry" would create a barrier to entry that Section 271 is designed to prevent (id. at 53).[30] AT&T also argues that because Verizon's distribution network constitutes "essential facilities," Verizon's wholesale rates to competitors must not be greater than the cost that Verizon itself incurs in providing the same facilities to its own retail operations (id. at 53 n.128).

In addition, AT&T argues that the Department has exercised authority over the pricing of Section 271 UNEs, and is free to exercise this authority again (AT&T Reply Brief at 10). AT&T maintains that the Department exercised this authority in the Consolidated Arbitrations, when it ordered Verizon to continue to offer UNE-P at TELRIC (AT&T Reply Brief at 10-11, citing Consolidated Arbitrations Phase 4-P Order at 9). AT&T also points to the Department's Order in 03-59-A, where it argues the Department exercised the same authority by requiring that Verizon file a tariff for enterprise switching, a Section 271 UNE (AT&T Reply Brief at 12, citing Triennial Review 03-59-A at 8, n. 9).

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[30] AT&T also argues that where a subset of just and reasonable rates would be anti-competitive, a federal agency must select a rate that does not work a discrimination (AT&T Brief at 53 n.128, citing Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976)). In Conway, the Court held that while both wholesale and retail rates may be just and reasonable individually, the Federal Power Commission was permitted to consider whether the difference between the (non-jurisdictional) retail and the wholesale rates was just and reasonable in determining whether to approve the wholesale rate. The analogous situation here, however, is not whether the Section 271 wholesale rate is just and reasonable given an alleged "price squeeze," but whether the jurisdictional retail rate is just and reasonable. Conway does not support the proposition that the Department can fix a non-jurisdictional wholesale rate (here, UNE pricing at TELRIC).

(2) Conversent

Conversent states that the Act imposes on Verizon a continuing obligation to satisfy the conditions required for Section 271 approval (Sprint Brief at 18, citing FCC Massachusetts § 271 Approval Order at ¶ 250). Conversent argues that Verizon must continue to comply with the Section 271 checklist, which oblige Verizon to provide inter alia "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services" and "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services" (Conversent Brief at 18, citing 47 U.S.C. § 271 (c)(2)(B)(iv) - (v)).

Conversent maintains that the FCC has found that many entry barriers exist for high capacity loops and dark fiber interoffice transport (Conversent Brief at 18-19). Conversent also argues that, in addition to the entry barriers identified by the FCC, the Department itself has found that special access pricing is an entry barrier for CLECs who want to compete with Verizon's private line service, and that the Department therefore required Verizon to price intrastate special access services in the same manner as UNEs (Conversent Brief at 19-20). Conversent argues that in order to ensure that local markets remain open to competition, the Department should require Verizon to continue to provide high capacity DS1 and DS2 loops and dark fiber transport at TELRIC rates (Conversent Brief at 20).

(3) Covad

Covad argues that Verizon is obligated to unbundle network elements under Section 271 at rates consistent with TELRIC, and those obligations specifically require Verizon to provide unbundled access to the high frequency portion of the loop ("HFPL"), also known as line sharing (Covad Brief at 1). Because HFPL is a form of loop transmission, argues Covad, Verizon remains under a statutory obligation pursuant to Section 271 to offer HFPL transmission, notwithstanding any finding of "no impairment" pursuant to Section 251 (id. at 4-5).

(4) Joint CLECs

The Joint CLECs argue that withdrawal of enterprise switching elements from M.D.T.E. No. 17 and repricing those elements at resale rates is unlawful (Joint CLEC Comments at 2-3). The Joint CLECs argue that the checklist in Section 271 unambiguously requires that local switching used to serve both enterprise and mass market customers be made available by Verizon, even if switching is removed from the national list of Section 251 elements (id. at 3). The Joint CLECs state that Verizon's proposed "replacement" rates for local switching have not been reviewed by any regulatory body to ensure that they comply with the "just and reasonable" standard (id.). Moreover, the Joint CLECs maintain that the Section 251(c)(4) resale rate does not comply with the just and reasonable standard (id.).

Furthermore, the Joint CLECs argue that the Department's endorsement of Verizon's Section 271 application was based in part on the availability of loops, switching, and transport at TELRIC (Joint CLECs Brief at 8). The Joint CLECs maintain that the Department is not precluded from establishing rates for Section 271 UNEs, and the Joint CLECs urge the Department to consider the "sustenance of competition" when establishing rates for Verizon's Section 271 offerings (id.).

(5) Joint Parties

The Joint Parties argue that the Act requires that the Department arbitrate rates for any UNEs that Verizon is required to continue to offer solely on the basis of its continuing Section 271 obligations (Joint Parties Brief at 17). The Joint Parties indicate that the FCC has suggested a "just and reasonable" pricing standard for Section 271 elements, and the Joint Parties maintain that TELRIC rates are, by definition, just, reasonable, and nondiscriminatory (Joint Parties Brief at 17-18). The Joint Parties argue that the Department should use TELRIC as a baseline if and when it arbitrates rates for Section 271 UNEs, and that it would be consistent with the Act to continue to price Section 271 UNEs at TELRIC. (id. at 18).

(6) MCI

MCI argues that the Act requires Verizon to continue to provide delisted UNEs at TELRIC, and that such a result is consistent with Congressional intent (MCI Brief at 7).

(7) Sprint

Sprint argues that Verizon's commitment to the provision of UNEs, particularly UNE-P, formed the basis of the competitive showing necessary for the FCC's grant of in-region long distance authority to Verizon, and that Verizon's attempts to cease providing these UNEs undermines the rationale behind the FCC's grant of authority (Sprint Brief at 9). Sprint argues that Verizon is obligated to continue to provide UNEs pursuant to various provisions of federal law, including but not limited to Section 271 (Sprint Reply Brief at 2).

(8) Verizon

Verizon argues that under the Act and the FCC's rules, TELRIC pricing applies only to network elements unbundled under Section 251(c)(3) (Verizon Brief at 32). Verizon points out that the FCC held: "[i]f a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms, and conditions for that element are determined in accordance with sections 201(b) and 202 (a)" (Verizon Comments at 4-5, citing Triennial Review Order at ¶¶ 662-63). Verizon argues that the FCC has exercised its authority to implement Section 271 and ruled that Sections 201 and 202 – which require market prices rather than regulated rates to prevail – establish the standard that BOCs must meet in offering access to Section 271 elements (Verizon Reply Brief at 40). Verizon alleges that the FCC has specifically indicated that TELRIC pricing or other forward-looking pricing for Section 271 elements would be "counterproductive" and unnecessary to protect the public interest (Verizon Reply Brief at 40-41, quoting UNE Remand Order at ¶473). Verizon asserts that the FCC determination preempts any state commission attempt to establish a regulated rate, such as TELRIC, for Section 271 elements (id. at 41). Verizon concludes by reminding the Department that it has already addressed this issue, first in D.T.E. 98-57-Phase III, and again in D.T.E. 03-59, concluding that the Department has no authority to review or enforce Verizon's Section 271 obligations (id. at 41-42). Verizon also notes that the Department has acknowledged that Section 271 elements are not subject to TELRIC-based pricing (Verizon Brief at 33, citing D.T.E. 03-59-A at 7).

Moreover, Verizon claims that the Department has no jurisdiction to review the reasonableness of rates for Section 271 elements (Verizon Reply Brief at 33; Verizon Comments at 5). Verizon argues Section 271(d)(6) "explicitly grants exclusive enforcement authority to the FCC to ensure that Verizon MA continues to comply with the market opening requirements of Section 271" (Verizon Brief at 33, citing Triennial Review Order at ¶¶ 664-65; see also Verizon Comments at 5). Verizon notes that the FCC has held that Congress granted it exclusive authority to administer and assess Bell operating companies' compliance with Section 271, whereas the role of state commissions is strictly derivative of the task Congress charged to the FCC (Verizon Reply Brief at 38). Verizon argues that Section 271 only calls for the FCC, when considering an application for long-distance approval, to consult with state commissions to verify that the Bell operating company has complied with the requirements (Verizon Reply Brief at 38). Verizon adds that Congress gave state commissions no role after approval of such an application and that state commissions therefore have no authority to issue an order dictating conditions on the provision of Section 271 elements (id. at 38). Verizon notes that the Department stated: "The Department . . . does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271. See 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 obligations is before the FCC." (Verizon Brief at 33, citing D.T.E. 03-59, at 19; Verizon Comments at 5).

b. Analysis and Findings

The FCC made clear in the Triennial Review Order that Section 271 establishes unbundling obligations that are independent of Section 251. See Triennial Review Order at ¶ 653; see also USTA II, 359 F.3d at 588-90. The FCC found that Section 271 requires Verizon to provide the following network elements – loops, switching, transport and signaling – and where the FCC finds that there is no impairment under Section 251, these elements should be priced, not according to TELRIC, but rather according to the "just and reasonable" rate standard of Sections 201 and 202 of the Act. Triennial Review Order at ¶¶ 653-56; USTA II, 359 F.3d at 589-90 (holding in response to CLEC claims that non-TELRIC pricing for Section 271 network elements was unreasonable, that there is "nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment"). In addition, Section 271 does not contain the same "combination" requirement of Section 251, and therefore, Verizon is not required to offer UNE-P under Section 271. Triennial Review Order at ¶ 656. As we noted in D.T.E. 03-59, the FCC has the authority to determine what constitutes a "just and reasonable" rate under Section 271, and the FCC is the proper forum for enforcing Verizon's Section 271 unbundling obligations.[31] D.T.E. 03-59,

[31] We note that the FCC has requested comments on whether it should clarify the independent Section 271 unbundling obligations and whether the FCC should preempt the states from asserting jurisdiction over enforcement of those obligations. In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, at ¶ 11 n. 38 (rel. Aug. 20, 2004); see Reply Comments of Massachusetts Department of Telecommunications and Energy at 13-15 (Oct. 19, 2004).

at 19, citing 47 U.S.C. § 271(d)(6); see also D.T.E. 98-57 Phase III-D, at 16. While the parties have argued that the Department should assert jurisdiction over Verizon's network elements and determine the pricing, terms, and conditions (e.g., require the UNE-P combination) of these elements under Section 271, we do not have the authority to determine whether Verizon is complying with its obligations under Section 271. 47 U.S.C. § 271(d)(6).

However, the FCC's jurisdiction to determine the reasonableness of the rates for Section 271 network elements does not divest the Department's common carrier tariff authority under state law. The FCC's authority under Section 271 is to determine the conditions for Bell operating companies to be permitted to enter, and to continue to serve, the interLATA market. The Department has general regulatory authority over intrastate common carrier services to enforce the obligation of "every" common carrier to file tariffs under state law. G.L. c. 159, §§ 12, 19. The FCC's jurisdiction to determine the reasonableness of rates for Section 271 elements and the Department's jurisdiction to enforce the filing of tariffs for common carrier services can coexist. Whether the Department's exercise of jurisdiction would "potentially" conflict with the FCC's determination of just and reasonable rates for Section 271 elements, under Sections 201 and 202 of the Telecommunications Act, is merely speculative. Moreover, where the FCC determines rates for Section 271 elements to be just and reasonable, the Department intends to defer to the FCC's findings in considering whether those rates, terms and conditions are just and reasonable under state law.

Where Verizon offers network elements on generally available terms pursuant to Section 271 and the FCC's rules, we determine that it offers the service as intrastate common carriage and therefore must file a tariff for the service with the Department. G.L. c. 159, §§ 12, 19. This is the same obligation as that of any common carrier. See, e.g., Clarification of Wholesale Tariffing Requirements, Memorandum to Massachusetts Telecommunications Carriers and Interested Persons (Telecommunications Division, Aug. 12, 2003) (noting that all carriers that are offering services as "common carriage" are required to file tariffs). We do not direct Verizon to file new tariffs for mass market local circuit switching, UNE combinations, high capacity loops, and dedicated transport today, because Verizon currently provides those elements under M.D.T.E. No. 17, in accordance with the Interim Rules Order. Where Verizon ceases to offer UNEs at TELRIC under M.D.T.E. No. 17, but where Verizon continues to offer such network elements (however the rates for services may be or may come to be calculated) in order to satisfy its Section 271 obligations, we direct Verizon to file new replacement tariffs with the Department, as we do, for example, in our review of Verizon's enterprise switching tariff revisions below.

D. Conclusion

The Department finds that conducting an investigation on whether Verizon should be required to unbundle mass market local circuit switching, UNE combinations, high capacity loops, and dedicated transport under state law, is inappropriate under the current docket. Such a broad investigation is beyond the scope of the current investigation under the now-vacated rules of the Triennial Review Order. Further, because we expect that the FCC will soon issue its new unbundling rules, and because the Interim Rules Order maintains the status quo, we find that it would be a waste of resources to conduct such an investigation until those final rules are known.[32] We would need to evaluate whether those final rules leave any room for parallel regulation before proceeding.

Because the Interim Rules Order also maintains all obligations in effect as of June 15, 2004 until the earlier of March 14, 2005 or when the FCC issues its final rules, all carriers are required to maintain the status quo, unless they reach agreed upon terms in their ongoing negotiations of interconnection agreements. Interim Rules Order at ¶ 1. All outstanding emergency motions before the Department for a standstill order therefore are denied as moot, because the FCC has ordered maintenance of the status quo. Finally, we dismiss the current investigation of all issues in D.T.E. 03-60, with the exception of Verizon's WPTS proposal, which we will open in a new docket, as discussed above. We will defer consideration of adopting the New York hot cut processes until after the carriers jointly propose adoption of the process in Massachusetts.

IV. ENTERPRISE SWITCHING TARIFF REVISIONS

A. Introduction

Verizon proposes to withdraw tariff provisions applicable to enterprise switching: Primary Rate ISDN Port, DS1 DID/DOD/PBX Port, unbundled local circuit switching line ports that are subject to the FCC's four line carve-out rule, local switched usage, including

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32 We also find that the Interim Rules Order, which requires ILECs to provide the UNEs in question on the same rates, terms, and conditions applicable on June 15, 2004, does not leave any room for parallel regulation by the Department to set different rates based on an independent investigation under state law. If the D.C. Circuit Court vacates the Interim Rules Order before the FCC's final rules have been issued, our ruling today stands, because we anticipate that the FCC will soon issue final rules, which we must evaluate before acting.

common (shared) IOF transport, for use with these ports, and combinations or platforms ("UNE-P") that include these ports. M.D.T.E. 17, Part B, §§ 6.1.1.A.1, 6.1.1.A.2. Verizon identified eleven central offices in which the four line carve-out rule would apply. Id. at § 6.1.1.A.3. These central offices are located in Density Zone 1, as defined by the FCC, not by the Department. Based on these tariff revisions, Verizon proposes to cease provisioning new orders for these network elements and to bill existing enterprise switching or UNE-P arrangements that remain in place at a rate equivalent to the FCC's resale rates[33] for business service in order to avoid service disruption, "except as otherwise required under an effective interconnection agreement between [Verizon] and the [requesting carrier]." Id. at § 6.1.1.A.

On July 22, 2004, the Department suspended Verizon's proposed tariff revisions to M.D.T.E. No. 17 until January 23, 2005, "unless otherwise ordered." In this Section, we evaluate whether it is appropriate to vacate the July 22, 2004 suspension order.

B. Positions of the Parties

1. AT&T

AT&T argues that Verizon's proposed tariff revisions are unlawful because Verizon would stop honoring its legal obligation to provide these UNEs, making it impossible for CLECs to use UNE-P to offer competitive services (AT&T Comments at 1-2). First, AT&T

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33 Letter from John L. Conroy, Vice President-Regulatory, Verizon, to Mary L. Cottrell, Secretary, Department of Telecommunications and Energy at 2 n.3 (June 23, 2004) ("Tariff Transmittal Letter"); see also 47 U.S.C. § 251(c)(4). The "resale rate" is the avoided cost discount rate established by the Department. In Massachusetts, that discount is approximately 25 percent lower than retail rates.

claims that Verizon's proposal to stop providing unbundled switching or UNE-P for enterprise customers that use DS1 or ISDN-PRI lines and to replace existing arrangements for such elements or combinations with "alternative arrangements" will lead to much higher wholesale rates (id.). Second, AT&T claims that Verizon's proposal seeks improperly to reclassify certain mass markets customers as if they were enterprise customers by implementing the four-line carve out (id. at 2).[34]

AT&T argues that Verizon's tariff amendments, which were filed only eight days after the June 15, 2004 order, are an attempt to eliminate UNE-P before the Department has had an opportunity to investigate whether that is permitted or desirable (id. at 3-4).[35] AT&T requests that the Department reject the tariff amendments or enter a standstill order and conduct an thorough investigation of the issues identified in the briefing questions issued in D.T.E. 03-60 (id. at 4).

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34 We omit discussion here of several arguments that the CLECs raise with respect to Verizon's obligations under its Alternative Regulation Plan, Verizon's obligations pursuant to Section 271, federal preemption, the Department's independent authority to investigate and order unbundling, and carrier of last resort obligations, each of which we have addressed earlier in this Order in our review of the parties' responses to our briefing questions in D.T.E. 03-60.

35 As we noted earlier in this Order, on June 15, 2004, the Department declined to act on emergency CLEC motions seeking an order requiring Verizon to continue to provide existing UNEs and UNE combinations at current rates, terms, and conditions, finding that Verizon's commitment to provide CLECs with at least 90 days notice before taking action to change its current provisioning of UNEs was sufficient to allow all parties concerned to focus on continued negotiations. D.T.E. 03-60, Letter Order at 2 (June 15, 2004).

AT&T argues that the four-line carve out is not the proper cutoff between the mass market and the enterprise market (id. at 10). AT&T contends that the Triennial Review Order does not envision an indefinite extension of the four-line unbundling exception for certain metropolitan serving areas ("MSAs"), but rather, it directs states to maintain that carve out where such an exception was enforced until new rules for unbundling mass market switching are determined (id. at 11-12). AT&T claims that the FCC replaced its four-line carve out rule with an economic test, basing the cutoff between the mass market and the enterprise market at "the point where it makes economic sense for a multi-line [DS0] customer to be served via a DS1 loop" (id. at 11, quoting Triennial Review Order at ¶ 497). AT&T argues that Verizon's proposal to implement the four-line carve out is improper because the four-line carve out was never implemented in Massachusetts and because the carve out may not be implemented without a proper economic analysis of the cutoff between the mass market and the enterprise market (id. at 12). Further, AT&T argues that Verizon should be estopped from arguing that the four-line carve out should apply because Verizon supported a mass market definition in D.T.E. 3-60 that would have included all customers served at the DS0 level regardless of the number of lines (AT&T Comments at 13-14). AT&T also argues that Verizon may not apply the four-line carve out, because Verizon has failed to offer access to enhanced extended loops ("EELs") at cost-based rates and has indicated that it intends to eliminate EEL arrangements consisting of DS1 or higher capacity loops and transport (id. at 14). Finally, AT&T argues that Verizon improperly seeks to enforce the four-line carve out at the Brockton, Cambridge-Bent Street, Cambridge-Ware Street, Framingham, Lowell, Lawrence, and Natick central offices, which AT&T claims are urban and suburban zones (id. at 21).

AT&T argues that the Department has "the power to investigate the unbundling of and interconnection with Verizon's network elements under state law" (AT&T Comments at 10, citing IntraLATA Competition, Vote to Open Investigation, D.P.U. 94-185 (1995)). AT&T states that in January 1995, the Department opened an investigation into whether Verizon should be required to unbundle elements of its local network and lease them at wholesale rates to new entrants that would use them to provide competing retail services (AT&T Brief at 18, D.T.E. 03-60 (filed July 30, 2004) ("AT&T Brief")). AT&T further states that after the enactment of the Telecommunications Act of 1996, the Department continued to oversee unbundling of Verizon's local network pursuant to federal law (id. at 18-19, citing Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 Phases 4-E (Mar. 13, 1998), 4-J (Mar. 19, 1999), 4-M (June 16, 1999)). AT&T states that the Department has broad authority to regulate the manner in which Verizon operates its local exchange network in Massachusetts and has broad powers to ensure the Verizon's regulations or practices affecting rates are not unjust, unreasonable, unjustly discriminatory, or unduly preferential (id. at 15, citing G.L. c. 159, §§ 12(d), 13, 14).

AT&T asserts that Verizon voluntarily committed to provide unbundled enterprise switching at TELRIC in Density Zone 1 until Verizon has negotiated pricing changes with CLECs and until the Department has approved the new rates as just, reasonable, and nondiscriminatory (AT&T Comments at 17). AT&T further contends that the Department held that it would be unacceptable for Verizon to offer UNE-P and to have the unilateral right to withdraw it without review, and that therefore, the Department ordered Verizon to offer UNE-P under the terms of its voluntary proposal (id. at 8-9, citing Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4-P (Jan. 10, 2000)). Therefore, AT&T argues that consistent with the Consolidated Arbitrations orders, the Department should not permit Verizon to terminate the availability of UNE-P "unilaterally" without further investigation of the tariff proposal under state law. (id. at 9).

2. Joint CLECs-II

The Joint CLECs-II argue that the Department cannot allow Verizon to "blatantly disregard [Verizon's] ongoing obligations under the Telecommunications Act . . . by discontinuing the provision of Unbundled Local Switching and Shared Transport to certain customers" (Joint CLEC-II Comments at 1). They argue that the Department cannot allow Verizon to implement "drastic changes to its service offerings without providing any justification as to why the changes are necessary" (id. at 2). They argue that Verizon's "replacement" rates, pricing these elements at the Section 251(c)(4) resale rate, do not comply with the "just and reasonable" rate standard (id. at 3). The Joint CLECs-II urge the Department to require Verizon to provide an analysis regarding the effect that its proposals would have on the continued viability of wireline competition in Massachusetts and justify why the changes are in the public interest (id.).[36]

[36] The Joint CLECs-II also argue that Verizon is obligated to offer enterprise switching as a UNE under its Section 271 obligations. We have already addressed our jurisdiction with respect to those obligations, supra.

3. Verizon

Verizon counters that the FCC found that CLECs were not impaired in the enterprise switching market and accordingly eliminated the local circuit switching UNE when provided to customers with DS1 capacity and above loops and applying the four-line carve out rule established in the UNE Remand Order (Verizon Comments at 3). Verizon asserts that its proposed tariff revisions appropriately implement federal law (id., citing 47 C.F.R. § 51.319(d)(3)).

Verizon argues that the applicable pricing standard for enterprise switching is the just, reasonable, and nondiscriminatory rate standard under Sections 201 and 202 of the Telecommunications Act, not the TELRIC pricing standard under Section 251 (id. at 5). Verizon notes that the Department has acknowledged this fact in its investigation of enterprise switching (id., citing D.T.E. 03-59-A at 7). Verizon further argues that the Department recognized that it does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271, but rather, that the proper forum for enforcing Section 271 obligations is before the FCC (id., citing D.T.E. 03-59, at 19).

Verizon disputes AT&T's argument that it should be estopped from applying the four-line carve out rule because Verizon classified all customers at the DS0 level as mass market customers in D.T.E. 03-60 (id.). Verizon argues that the issue in that proceeding was application of the FCC's competitive triggers for unbundled mass market switching, but the D.C. Circuit invalidated the FCC's delegation of authority (id.). Further, Verizon argues that, in contrast, the court did not invalidate the FCC's enterprise switching rules (id.). Verizon states that 47 C.F.R. § 51.319(d)(3) contains no condition requiring Verizon to have implemented the four-line carve out rule earlier in order to apply the rule today (id.). Further, Verizon maintains that the FCC found the former condition under the UNE Remand Order of applying the four-line carve out, the requirement that the ILEC provide new EEL combinations, to be moot (id., citing Triennial Review Order at ¶ 525 n.1608).

Verizon argues that the proposed tariff amendments do not conflict with the Department's June 15, 2004 order (Verizon Comments at 6). Verizon maintains that it provided CLECs with 90 days notice of the elimination of enterprise switching on May 18, 2004 (id.). Further, Verizon argues that nothing in the Department's June 15, 2004 order precludes Verizon from implementing the FCC rules for enterprise switching (id.).

Finally, Verizon disputes AT&T's claim that it incorrectly identified the central offices subject to the four-line carve out rule (id. at 6). Verizon maintains that the density zones referred to under the FCC rules are not the UNE density zones established by state commissions, but rather, the density zones established by the FCC for access pricing (id., citing 47 C.F.R. § 69.124; UNE Remand Order at ¶ 278 n.550).

C. Analysis and Findings

In considering whether we should vacate our suspension of Verizon's proposed tariff revisions, it is instructive first to review the results of our recent investigation of enterprise switching. In our 90-day investigation of enterprise switching pursuant to the Triennial

Review Order,[37] we provided all carriers an opportunity to demonstrate whether the FCC's finding of non-impairment for enterprise switching subject to the four-line carve-out rule should apply in Massachusetts, as well as whether the Department should petition the FCC for a waiver of its rule that incumbent local exchange carriers are "not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving [enterprise customers] except where the state commission petitions [the FCC] for a waiver of this finding in accordance with the conditions set forth in [47 C.F.R. § 51.319(d)(3)(i)] and the [FCC] grants such a waiver." 47 C.F.R. § 51.319(d)(3). In that investigation, the Department found that no carrier alleged facts sufficient to meet the FCC requirements in order to petition for a waiver. D.T.E. 03-59, at 15-17. Because a waiver petition without the required factual basis would be unlikely to prevail before the FCC, the Department declined to file such a petition, and the FCC's national findings regarding enterprise switching are therefore applicable in Massachusetts. Id. at 18. The D.C. Circuit did not vacate the FCC's enterprise switching findings in USTA II.

Aside from whatever obligations Verizon may have with respect to individual interconnection agreements, which we will address in D.T.E. 04-33, we find no merit to the argument that Verizon has an "ongoing" obligation to provide unbundled access to enterprise switching at TELRIC rates to serve customers subject to the four-line carve out rule. The FCC's enterprise switching rule unambiguously states that ILECs have no such obligation.

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37 Enterprise Switching, D.T.E. 03-59 (2003); see also D.T.E. 03-59-A (2004); D.T.E. 03-59-B (2004).

47 C.F.R. § 51.319(d)(3). The Department's ultimate conclusion in an investigation under state law must be "consistent with" and "not substantially prevent implementation of" the FCC's non-impairment findings and enterprise switching rule. 47 U.S.C. § 251(d)(3). All carriers have already been given an opportunity to present the Department with evidence of impairment for enterprise market switching and have failed to do so. D.T.E. 03-59, at 15-17.[38] We determine that the FCC's enterprise switching regulations, specifically Section 51.319(d)(3), are controlling in our review of the propriety of Verizon's proposed tariff revisions.

Regarding the four-line carve out rule, we find that Section 51.319(d)(3)(ii) requires ILECs to comply with the four-line carve out for unbundled switching without regard to whether the ILEC had previously implemented the rule pursuant to the UNE Remand Order. It would not make sense to require ILECs to comply with the rule only where they previously implemented the four-line carve out following the UNE Remand Order in 1999, because such a reading would have left the enterprise market without a definition of the relevant product market until state commissions, (or, now the FCC) completed their mass market impairment investigations. We also determine that while the current rules still require Verizon to provide EELs, the provision of EELs is not a precondition of applying the four-line carve-out, because

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38 But see D.T.E. 03-59, at 13-14 (noting Verizon's suggestion that state commissions may revisit whether CLECs are impaired due to changes under the FCC-specified operational and economic criteria). The appropriate recourse for CLECs, if they can demonstrate the relevant changes to the market structure, is to seek a waiver of the FCC's enterprise switching rule.

the FCC has found that aspect of the four-line carve out to be moot.[39] Triennial Review Order, at ¶ 525 n.1608.

Further, we note that in challenging Verizon's identification of central offices subject to the four-line carve out rule, AT&T makes its arguments based on the density zones that we established in Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4 (Dec. 4, 1996). We find, however, that the FCC's references to Density Zone 1 of the top 50 MSAs refer to the zones defined by the FCC, not by the Department. 47 C.F.R. § 69.124; UNE Remand Order at ¶ 278 n.550. Therefore, we find that the central offices identified by Verizon are properly included in Density Zone 1.

We decline to apply the doctrine of judicial estoppel to preclude Verizon from applying the four-line carve out on the basis that Verizon had agreed in D.T.E. 03-60 to classify all customers at the DS0 level as mass market customers. Under the doctrine of judicial estoppel, "a party who has successfully asserted a certain position under oath in an adjudicatory proceeding may not in a later proceeding 'assume a position relative to the same subject that is directly contrary to that taken at the first' proceeding." Niles-Robinson v. Brigham and Women's Hosp., 47 Mass. App. Ct. 203, 206 (1999). Although Verizon's position that customers subject to the four-line carve out should be treated as enterprise customers may appear contrary to the position that it took in D.T.E. 03-60, the Department did not adjudicate

39 Moreover, that Verizon chose to wait until now to enforce a requirement that it could have implemented in 1999 under the UNE Remand Order should not be a barrier to its doing so now.

the issue of the appropriate cut-off for multi-line DS0 customers in D.T.E. 03-60, because USTA II vacated the FCC's subdelegation of that issue to the state commissions.

Also, Verizon's proposed tariff revisions do not contravene our June 15, 2004 letter order in D.T.E. 03-60, because our concern in that order was whether there was any basis for continuing to investigate our implementation of the Triennial Review Order where the FCC's unbundling rules for mass market switching, among other UNEs, had been vacated. We have now completed our review of alternate bases of state regulation of the UNEs subject to USTA II. The FCC's enterprise switching rules, on the other hand, were unaffected by USTA II.

Moreover, even if any CLEC relied upon the June 15, 2004 as a basis for the maintenance of the status quo, they have had sufficient time to obtain alternate arrangements for enterprise switching. In the Department's June 15, 2004 letter order, the Department noted that Verizon agreed to provide CLECs with at least 90 days notice before taking any action to eliminate the provision of UNEs pursuant to applicable law and in accordance with its effective interconnection agreements.[40] During the 90-day period, Verizon pledged to continue to provide the de-listed UNEs at TELRIC rates and to continue to take new orders for those UNEs.[41] Given Verizon's 90-day notice commitment, the Department determined that action on the CLECs' emergency motions to require Verizon to provide those UNEs was

40 D.T.E. 03-60, Letter Order (June 15, 2004).

41 D.T.E. 03-60, Verizon Opposition to Parties' Requests for Emergency Relief at 3 (June 10, 2004).

unnecessary, but that the Department would need further comments on whether Verizon would continue to be obligated to provide the de-listed UNEs. We note that the carriers have now had over 90 days to conduct negotiations as to the continued availability of enterprise switching, as well as other UNEs.

Finally, Verizon has not acted "unilaterally" to withdraw enterprise switching contrary to our Consolidated Arbitrations orders. Cf. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4-P (Jan. 10, 2000). Rather, Verizon did what we required in the Phase 4-P Order, which was to file a proposed tariff amendment for the Department's review before withdrawing enterprise switching as a UNE. Verizon has stated, however, that it would bill UNE-P arrangements that are subject to the tariff revisions at a rate equivalent the FCC's resale rate (Tariff Transmittal Letter at 2 n.3; Verizon Comments at 3 n.4). Verizon has not filed this replacement rate in the form of a tariff. We note that few carriers would be affected by removing enterprise switching from M.D.T.E. No. 17, because most carriers, including AT&T and the Joint CLECs-II, obtain enterprise switching pursuant to their interconnection agreements, and thus the terms available to AT&T and the CLECs will depend upon the results of their ongoing negotiations and the Department's ongoing arbitration proceeding, D.T.E. 04-33, not upon the terms available through tariffs.[42] Even so, we find that Verizon will be offering enterprise switching as common carriage to those remaining carriers, because Verizon's statement makes an offer to continue to serve such carriers indiscriminately, albeit at the resale rate.[43]

As we indicated in D.T.E. 03-59-B, if Verizon offers enterprise switching as common carriage, Verizon must file a tariff for the service on just and reasonable, market-based terms, rather than at TELRIC rates. D.T.E. 03-59-B, at 9; see also D.T.E. 03-59-A, at 8 n.9; G.L. c. 159, §§ 12, 19. We emphasize, as we did in D.T.E. 03-59, that in requiring Verizon to file such a tariff, we would not review the tariff to determine whether Verizon is meeting its Section 271 obligations, because compliance with Section 271 is for the FCC to decide. 47 U.S.C. § 271(d)(6). Rather, we would review the tariff to determine whether the terms are "just and reasonable" as required by Massachusetts law. G.L. c. 159, §§ 14, 17; see also D.T.E. 03-59, at 19; D.T.E. 03-59-A, at 8 n.9; D.T.E. 03-59-B, at 8-9. We determine that conflict with the FCC's enforcement regulation of Section 271 elements is unlikely, because the FCC has stated that, in determining whether a rate is just and reasonable under

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42 Moreover, the availability of service under a tariff has no effect upon the duty of the parties to negotiate according to the terms of their individual interconnection agreements. D.T.E. 98-57-Phase-I at 20-22 (Mar. 24, 2000); cf. 47 U.S.C. § 252(f)(5). We note also that Verizon asserts that the negotiated rates that it initially proposed under its "Wholesale Advantage" program are substantially lower than the resale rate (Verizon Brief at 5).

43 We observe that it certainly appears from the plain terms of the checklist items in Section 271 that the FCC would require Verizon to offer enterprise switching as common carriage. Thus, even without Verizon's explicit statements that it would continue to provide switching services, we conclude that Verizon would continue to offer switching in order to comply with the FCC's requirements, unless the FCC rules that Verizon does not have such an obligation.

Sections 201 and 202 of the Act, the FCC would apply the same "just and reasonable" standard that state statutes historically have applied to common carriers. Triennial Review Order at ¶ 663. It follows, therefore, that conforming to the FCC requirement under the federal "just and reasonable" standard would, in a matter where federal authority is preeminent, even though not exclusive, be strong evidence that the standard in G.L. c. 159, §§ 12, 14, 17, is met. Should the FCC subsequently find that Verizon must provide enterprise switching at a different rate in order to comply with Section 271, we intend to defer to the FCC's finding on whether a rate is just and reasonable in order to avoid any conflict preemption issues. See D.T.E. 03-59-B, at 8.

Because these rates are not required to be at TELRIC, it is not appropriate to tariff enterprise switching under M.D.T.E. No. 17, which is Verizon's tariff for Section 251 UNEs. Therefore, we direct Verizon propose a different tariff for enterprise switching elements and file replacement rates for those elements by January 31, 2005. We will permit Verizon to apply the rates in that tariff from the date of this Order. For the same reasons, we also direct Verizon to file its current rates for Directory Assistance and Operator Services, which we note were de-listed as UNEs under the UNE Remand Order, but which Verizon continues to offer as common carriage.

V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the Department's investigation to implement the requirements of the Federal Communications Commission's Triennial Review Order regarding switching for mass market customers, UNE-P, high capacity loops, dedicated transport, and hot cuts in D.T.E. 03-60 is DISMISSED; and it is

FURTHER ORDERED: That all outstanding emergency motions in D.T.E. 03-60 to maintain the status quo with respect to the provisioning of unbundled network elements are DENIED as moot; and it is

FURTHER ORDERED: That Verizon shall resubmit an updated WPTS proposal by January 31, 2005, and that all documents submitted in D.T.E. 03-60 pertaining to WPTS may be resubmitted into the new docket by any party; and it is

FURTHER ORDERED: That the suspension of Verizon's tariff revisions to M.D.T.E. No. 17, filed on June 23, 2004, is VACATED; and it is

FURTHER ORDERED: That Verizon shall file replacement rates for the enterprise switching offerings withdrawn from M.D.T.E. No. 17, by January 31, 2005; and it is

FURTHER ORDERED: That all carriers shall comply with all other directives contained in this Order.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Eugene J. Sullivan, Commissioner

/s/
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order, or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order, or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order, or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5 Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).